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In Supreme Court of the United States

OCTOBER TERM 1904.

No. 233.

A. H. LEONARD ET AL.

Versus

V., S. & P. R. R. COMPANY ET AL.

In Error to Supreme Court of the State of Louisiana.

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BRIEF AND ARGUMENT OF DEFENDANTS.

The Vicksburg, Shreveport and Pacific Railway Company instituted this suit against Tibbs et al to recover lots 1, 2, 3, 4, 5, 6, 7, 8 and 9 of section 31, township 18 north, range 13, containing 178 80-100 acres (usually known as Silver Lake) less 35 18-100 acres of same recovered by R. N. Smith et al, as shown by judgment in suit R. N. Smith et al. vs. George

A. Turner, et al, No. 80, docket United States Circuit Court, Western District of Louisiana.

The railroad company claims title to said land through grant from the United States by Act approved July 3, 1856, granting lands to the State of Louisiana to aid in the construction of railroads in said States duly accepted by the grantee.

That said land was included in the approved selections made under authority of said act, and that its title was further acquired through divers conveyance mortgages, decrees and sales and by the completion of the railroad through the parish of Caddo before June 3, 1866.

Tibbs et al disclaimed title disclosed the fact that they held at tenants of R. N. Smith and other heirs of W. W. Smith, deceased, and of George R. Wilson and A. H. Leonard, vendees of said heirs. The heirs of Smith, R. N. Smith et al, and the said Wilson and Leonard were substituted as defendants in the court *a qua*, and *in limine* pleaded.

RES JUDICATA AND ESTOPPEL.

By this plea defendants in court *a qua* set up as a bar to plaintiff's action the judgment referred to in petition of plaintiffs in court *a qua*, rendered in suit R. N. Smith et al vs. George A. Turner et al, No. 80 on docket of the Circuit Court of the United States, Western District of Louisiana. T. p. 71.

They aver that the heirs of W. W. Smith (the defendants in court *a qua* with exception of A. H. Leonard and Geo. R. Wilson, who acquired from said heirs) instituted suit No. 80 on docket of the Circuit Court of United States for the Western District of Louisiana against George A. Turner, alleg-

ing and claiming ownership of the entire tract known as Silver Lake and praying to be restored to possession of about forty acres thereof illegally held by Turner.

That Turner disclaimed title and averred held as tenant of the Vicksburg, Shreveport and Pacific Railroad Company (the plaintiff in court *a qua*), thereupon said company appeared interposing pleas in bar and answered claiming possession and ownership of the entire tract known as Silver Lake and setting up their title to said tract as a whole.

That on final hearing a judgment was rendered in suit No. 80 on all issues therein raised in favor of the plaintiffs therein, the said heirs of W. W. Smith, decreeing them to be the owners of the land in controversy in said suit and restoring them to possession of same. That under said judgment the said heirs of W. W. Smith (defendants in court *a qua*) were put in possession of said land. That said judgment is final and has the force and effect of *res judicata* as against all parties to said suit and as against the claims of the V. S. & P. R. R. Co., and estops the said company from asserting the claims now made by them. That after said judgment became final the said Leonard and Smith acquired from the heirs of W. W. Smith an undivided interest in the entire Silver Lake tract and entered into possession of same.

This exception being overruled, defendants in court *a qua* answered.

ANSWER.

Without prejudice to their plea of res judicata and estoppel and reiterating same, defendants deny all allegations of plaintiffs'

petition except as herein admitted. They admit plaintiffs are not owners of 35 18-100 acres of land recovered by R. N. Smith and others, as shown by judgment rendered in suit R. N. Smith et al vs. G. A. Turner et al, No. 80, docket United States Circuit Court, Fifth Circuit, Western District of Louisiana, and admit that said 35 18-100 acres is a portion of the tract of land described in plaintiff's petition and usually known as Silver Lake.

They also admit that they are in possession of the entire tract.

They aver that they own and possess same as heirs of W. W. Smith and as vendees of said heirs, and were put in possession of same by the marshal of the Western District of Louisiana under writs of possession issued in suit No. 80 and in suit No. 139 on docket of the said United States Court, entitled R. N. Smith vs. Jake Ford et al, in the years 1886 and in 1889, and have ever since been in possession of same as owners.

As a peremptory exception and plea in bar to plaintiff's demand they plead res judicata and estoppel from the judgment and the record in said suit No. 80.

They aver that the State of Louisiana, through its constituted authorities, sold to W. W. Smith (since deceased) on May 14, 1853, a certain tract of land known as Silver Lake, situated in section 31, township 18, ranges 13 and 14, in the parish of Caddo, containing an area of 186 51-100 acres, including the land claimed in plaintiff's petition, at a price of $1.25 per acre, which at the time was paid into the treasury of the State by said Smith, as appears by the certificate of sale annexed and made part hereof. That afterwards on the 24th day of February, 1855, the State issued a patent for said land to said Smith, as appears by

patent annexed.

That the State claimed and acquired said land as swamp and overflowed land granted to the State by Acts of Congress of 1849 and 1850, known as the swamp-land grants, and that the State sold said land to W. W. Smith as swamp and overflowed lands, and it was at the date of passage of said acts of Congress swamp and overflowed land.

That all sales of land in Louisiana claimed as swamp and overflowed land by the state, whether made by the United States or by the state, and whether the land sold was of that character or not, were confirmed by acts of Congress approved March 2, 1855, and March 3, 1857.

That said W. W. Smith acquired title to said land both from the state by purchase and from the United States by said conformatory acts, and that his title is paramount to all subsequent claims from the government and is indefeasible.

That defendants are the just, true and legal owners of the tract of land known as Silver Lake.

That R. N. Smith and other heirs of W. W. Smith, deceased, finding one Geo. A. Turner in possession of a portion of said tract, instituted in the Circuit Court of the United States an action against him, claiming ownership of the entire tract known as Silver Lake, alleging that a portion of same, about 40 acres, was in the possession of Turner, making all the allegations hereinbefore made and praying for judgment decreeing them to be the owners of said tract and putting them in possession of that portion of it held by him. That in said suit Turner appeared, disclaimed title and declared he held as tenant of the Vicksburg, Shreveport and Pacific Railroad Company (plaintiffs herein.)

That thereupon said company was made party defendant, appeared and answered denying all allegations made by R. N. Smith and others, set up title in said suit, just as they now in this suit declare on it, and interposed various objections to the title of W. W. Smith and exceptions and pleas to the action brought by his heirs, all of which appears by the answers, exceptions and the pleadings in said suit No. 80, and the record thereof, hereto annexed and made part hereof.

That on the issues so raised suit No. 80 was tried and there was judgment in favor of the plaintiffs therein, the said heirs of W. W. Smith and against the said railroad company, decreeing the said heirs to be the owners of Silver Lake and entitled to possession of same.

That the railroad company from said judgment sued out a writ of error to the Supreme Court of the United States, which Court dismissed said writ and affirmed said judgment, which thereupon became final, and then the railroad company surrendered to the heirs of W. W. Smith all that portion of the Silver Lake tract in the possession of said company and fully acquiesced in said judgment.

Defendants aver said judgment is final and conclusive against the pretensions of said railroad company, plaintiffs herein, and defendants in said suit No. 80. That as against said company the allegations herein made are conclusively true, in consequence of the judgment aforesaid are *res adjudicata* and that said judgment is a full, complete and effective bar to any claim of ownership of said Silver Lake tract or any portion thereof on the part of said railroad company.

That on July 5th, 1888, the said R. N. Smith and other

heirs of W. W. Smith instituted suit against Jake Ford and others, some seventy-five in number, in possession of that portion of Silver Lake not held as aforesaid by said Turner, made allegations similar to those made by them in said suit No. 80 and similar prayer, to which defendants answered, and on trial judgment was rendered in favor of said heirs. That thereon writs of possession issued under which one defendant was evicted and the other defendants acquiesced and surrendered possession to said heirs of W. W. Smith, as appears by reference to the record in said suit against Ford et al. to the writ of possession therein issued and the return thereon, annexed and made part of answer.

They allege they have paid taxes on land sued for and in event of recovery by plaintiffs pray for judgment for amount of same.

By agreement questions as to taxes paid were without prejudice reserved for future consideration.

The pleadings in this case are identical with and raise precisely the same issues raised and decided in case R. N. Smith et al. vs. Turner and the V., S. & P. Ry. Co., No. 80, United States Circuit Court. The exact facts established in that case are established in this and by exactly the same evidence, and the parties to this suit were parties to the suit No. 80. It does not seem to be legally possible that questions of law and fact raised and determined in suit No. 80 can be again inquired into or passed on in this suit.

STATEMENT OF CASE.

By act of March 2d, 1849, entitled an act "To aid the State of Louisiana in draining the swamp lands therein," and by act of September 28, 1850, entitled "An Act to enable the State of Arkansas and other states (including Louisiana) to reclaim the swamp lands within their limits," Congress granted to Louisiana "the whole of those swamp and overflowed lands therein made unfit thereby for cultivation which shall remain unsold at the passage of the act." In both grants it is provided that "The proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively as far as neecssary to the purpose of reclaiming said lands by means of levees and drains."

It has been uniformly held by repeated decisions of the Supreme Court of the United States, and indeed by all courts, federal and state, in which these acts have been considered, that they are grants *in praesenti* vesting from their date title in the respective states to the lands of the character described in the grants.

The lands in controversy were, when the swamp land grants were made, have ever since remained and are now lands of the character described in the grants, being, as shown by uncontradicted evidence, low and overflowed lands, overflowed by water from Red river, except when the stage of water in that stream is low, and then the greater portion of the tract is overflowed by rain water flowing from adjacent hills.

It follows that the title to the land in controversy was vested in the state, on the 2nd day of March, 1849, and again on the 28th of September, 1850, by the swamp land grants. By act

of the General Assembly of Louisiana, No. 248, session 1852, entitled "An Act to provide for the sale of a portion of the swamp and overflowed lands, granted to the State by Acts of Congress, approved March 2nd, 1849, and September 28th, 1850, and to appropriate proceeds thereof," the register of the State Land Office was authorized to sell warrants for one million acres of land to be located on the swamp and overflowed lands donated by Congress, such warrants to be for not more than 640 or less than 40 acres, and to be sold for not less than one dollar and twenty-five cents per acre; to procure plats and maps of all the swamp lands donated to Louisiana; to enter on same and in a book to be by them kept an entry of all such lands sold, with name of purchaser and price paid.

This act expressly provides (section 7) "That the proceeds of sale of lands or of warrants shall be a special fund for leveeing and draining."

This act formally accepted the grants made by Congress and by it the state, as good faith required, expressly appropriates all moneys accruing from sale of lands donated, to the purpose in aid of which they were granted. By subsequent acts passed in 1852 and 1853 the General Assembly provided for extensive works of leveeing and draining to be paid for out of proceeds of sale of public lands. The land in controversy—Silver Lake—was in 1838 surveyed by United States surveyors and copies of their maps and plats with field notes were on file in the State Land Office as early as January 27, 1840. Being overflowed land granted to the state by Congress, the sale of which was directed by Act 248 of 1852, it was the duty of the state land officers to sell same at price fixed by the act to anyone applying

to purchase.

By Act of 1853, No. 248, the General Assembly of Louisiana authorized the Register of the Land Office to sell the shallow lakes in this state the area of which has been ascertained by survey and which are susceptible of being reclaimed by draining and leveeing.

As has been stated, on March 19, 1838, the Department of the Interior approved a plat or map of Silver Lake showing that said tract has been surveyed, meandered and traversed by United States surveyors. See Printed Transcript, 2nd map, between pages ——, and field notes, p. 258.

The certificate of Crenshaw, State Register, of date June 10, 1853, shows this map with the field notes were then on file in the State Land Office. See map p. 258. This certificate does not show when they were put on file but it is shown on map, 2nd map p. 244 (see top map on right) that it was received January 27th, with surveyor-general's letter of January 15, 1840.

The area of Silver Lake is not marked on the map, but the tract had been meandered, traversed and platted and field notes given from which the area could be readily ascertained by any surveyor, or indeed by anyone at all familiar with mathematics.

That such area was ascertained prior to May 15, 1853, is certain. On that date the State Register certified that W. W. Smith had purchased Silver Lake, containing 186 57-100 acres, at price of $1.25 per acre. See certificate, T. p. 256. This purchase was made with a land warrant issued by the state under Act 248 of 1852. On May 24, 1855, the state issued to

W. W. Smith a patent to the land purchased by him. T. p. 257.

In this patent it is recited that Smith had purchased the land thereby conveyed to him on May 14, 1853, with warrant No. 1. This warrant was issued under Act 248 of 1852. The land sold to Smith could not have been purchased with a warrant of any other kind or class—the only other land warrants issued by the State prior to May 14, 1853, being those issued under Act No. 91 of 1844, which on their face were receivable only for lands granted to the State by Congress for internal improvements and seminaries.

It is stated in the patent that " W. W. Smith had purchased with warrant No. 1 a certain shallow lake known as Silver Lake, situated in the parish of Caddo, in township 18, north of range 13 and 14 west, containing 186 57-100 acres, according to the official plat of the survey of the said lands, returned to the State Land Office by the Surveyor of the United States for the State of Louisiana, which said tract has been purchased and paid for at $1.25 per acre." The description in patent of tract sold Smith as a certain shallow lake known as Silver Lake cannot affect the real character of the tract. It is made certain by the uncontested evidence adduced in this cause, that the tract acquired by Smith was low land overflowed from Red river, except when that stream was low, and then overflowed for the greater part by rain water flowing from the adjacent hills, and thus made unfit for cultivation. Whether it was or not a "shallow lake," it was and yet is lands of the character described in the swamp land grants, and passed to the State under those grants.

The Department of the Interior, represented at different times by different persons, has sometimes held that "shallow lakes" properly so-called passed to the States under the swamp land grants, and has sometimes held that they did not. The latest opinion of that department is that where the maps in the United States Land Office show that the United States surveyors have meandered what on such maps appears to be a body of water, then in the absence of any subsequent survey made by the United States, the Department declines to take any action whatever with regard to such tract, and leaves it to the State courts to determine the title to same.

In the only case in which the question whether or not "shallow lakes" passed to the States under the swamp land grants was presented to a court, it was held that such lakes were overflowed lands of the character stated in said grants, and under them became vested in the States at the date of the grants. Indiana vs. Milk, Federal Reporter p. ....

Congress, by the swamp land grants, and the State, by Act 248 of 1852, dedicated all the swamp and overflowed lands in Louisiana and all moneys accruing from sale of same to the purpose of reclaiming those lands by means of levees and drains.

On the 28th day of September, 1850, the title to the land in controversy was by the United States irrevocably vested in the State. Thereafter the title of the State could not be affected by any action or legislation of the General Governmnet. On May 14, 1853, the title to the land in controversy was by the State vested in W. W. Smith by certificate, and on May 24, 1855, by patent. His rights so vested could not be affected by

any subsequent State action or legislation.

On June 3rd, 1856, Congress granted to Louisiana in aid of the construction of a railroad from the Texas line via Greenwood, Shreveport and Monroe to a point on the Mississippi river opposite Vicksburg, every alternate section of land designated by odd numbers for six sections in width on each side of such road. "Provided, that any and all lands heretofore reserved by Act of Congress for purposes of aiding in any object of internal improvement or for any other purpose whatsoever were reserved from the operation of this Act."

As was said by the Supreme Court of the United States in case Railroad Company vs. Fremont County, 9 Wall. 89-94: "These reservations clearly embrace the previous grant of the swamp and overflowed lands for the purpose of enabling the States to redeem them and fit them for cultivation by levees and drains." Even though this reservation had not been expressly made, in Act of June 3rd, 1856, it was operative by effect of law. The grants of 1849 and 1850 being grants in praesenti, vesting from their date title in the State to all swamp and overflowed lands therein—the title of the United States was by these grants immediately divested and such lands ceased to be part of the public domain.

Nevertheless the lands in controversy were certified to the State by the Department of the Interior in aid of the construction of the railroad designated in Act of June 3, 1856. But this certificate was given subject to all of the conditions of Act of June 3rd, 1856, and subject also "to any valid interfering rights which may exist to any of the tracts embraced in the list of lands certified."

Swamp lands were reserved from the grant in aid of railroads, and W. W. Smith had acquired "valid interfering rights" before June 3rd, 1856.

On December 3rd, 1857, the State instituted in the district court for Caddo Parish a real action against W. W. Smith to annul the entry and patent issued to W. W. Smith for Silver Lake,

1—Because the law under which entry was made had not been promulgated at date of entry.

2—Because the lake had not at the time of entry been legally surveyed, nor had the surveys been recognized by the State.

3—Because the patent was issued in error.

To this action W. W. Smith excepted, his exception was maintained in the district court, but on appeal was overruled by the State Supreme Court at its July term, 1858, and the cause was remanded to the district court.

W. W. Smith died October —, 1858. On the 25th day of October, 1858, John W. Smith applied to be, and was subsequently appointed, administrator of the succession of W. W. Smith.

In his petition John W. Smith names the heirs of W. W. Smith, viz: Jas. F. Smith, brother of deceased, and the minor children of John K. Smith, deceased, also a brother of W. W. Smith, represented by their mother, all residents of Shelby county, Kentucky, and prays for the appointment of counsel to represent the absent heirs, which was done. W. O. Crain was appointed attorney to represent the absent heirs and accepted the appointment. T. p. 286.

On November 30, 1858, John Brown filed in the district court of Caddo Parish a petition setting forth that he had been by the court of Shelby county, Kentucky, appointed guardian of the minor heirs of John K. Smith, deceased, brother of W. W. Smith, also deceased; that his wards are heirs at law of W. W. Smith, and inherited one-half of his estate, the other half being inherited by James Smith, of Shelby county, Kentucky.

That it is important that the said guardian be recognized as guardian or tutor of said minors to take possession of their property. He prays that he be recognized and that a family meeting of relatives and friends be assembled, etc.

A family meeting was held, who advised as follows: That John Brown administer the property of his said wards in the parish of Caddo, on giving bonds and taking oath as tutor. That he accept for his wards the succession of W. W. Smith, with benefit of inventory, etc., etc.

The proceedings of this meeting were homologated, John Brown was appointed tutor of said minors; he took the oath and gave bond and an undertutor was appointed and qualified on December 1st, 1858. T. 238-244.

On February 14, 1859, in case State vs. Smith, the State filed a petition of revival, suggesting the death of W. W. Smith, praying for citation to John W. Smith, administrator of W. W. Smith, and for service upon all other legal representatives. No service was made. John W. Smith, administrator, waived citation and as administrator filed an answer, averring W. W. Smith to be owner of the land in controversy by virtue of purchase from the State according to law, and a patent issued to

him. T. 264.

On November 20, 1860, judgment was rendered by the district court of Caddo Parish in the case of State vs. Smith, annulling entry and patent issued to W. W. Smith. John W. Smith, administrator, applied for and obtained an appeal to the Supreme Court, T. 280, and gave an appeal bond. T. p. 283.

This appeal was pending in the Supreme Court on the 14th day of August, 1866. The minutes of the Court showing that on that day in case of State of Louisiana, appellee, vs. W. W. Smith, appellant, No. 53, an answer was filed and case continued. T. p. 287.

On the 2nd day of July, 1867, John W. Smith, administrator of succession of W. W. Smith, deceased, filed his final account as such administrator.

On the 3rd day of August, 1867, that account was by judgment homologated and approved, John W. Smith was discharged from the further administration of the succession of W. W. Smith, and his bond as such administrator was cancelled. T. 288.

At the date of this judgment the appeal in the case of State vs. Smith was still pending in the Supreme Court of the State, and on the 7th day of August, 1867, it appears by the minutes of the Court that the appeal was dismissed by consent.

There were no parties to consent to dismissal and in the absence of parties no action in the cause could be taken except to revive the cause. In that cause the succession of W. W. Smith had been, if represented at all, represented only by John

W. Smith, administrator, and as *pending* the appeal John W. Smith was discharged from his office as administrator and his bond was cancelled, there was no longer any party defendant in the cause before the Supreme Court, and until proper parties were made the cause could not be dismissed. The appeal is still pending, and it follows that the judgment appealed from is not *res judicata.*

In the year 1885 the heirs of W. W. Smith found that Silver Lake was in the possession of quite a number of persons, tenants of the Vicksburg. Shreveport and Pacific Railroad Company, among others one George A. Turner. Desiring to regain possession of their property, and being by the law of Louisiana required to bring a petitory action (at common law action in ejectment) against the person in actual possession, Robert N. Smith and the other heirs of W. W. Smith, on November 5th, 1885, instituted such an action in the Circuit Court of the Western District of Louisiana against the said Turner. These heirs alleged:

That the State of Louisiana, through its constituted authority, sold to W. W. Smith, on May 14th, 1853, a certain tract of land known as Silver Lake, situated in section 31, township 18, ranges 13 and 14, in the Parish of Caddo, containing 186 57-100 acres, at the maximum price of $1.25 per acre, which at the time was paid into the treasury of the State by the said W. W. Smith, as shown by the certificate of sale annexed and made part of their petition;

That after said sale the State, through its constituted authorities, did, on the 24th day of February, 1855, issue a patent

for said tract of land to the said W. W. Smith, as is shown by the patent annexed to and make part of their petition;

That the State of Louisiana acquired said tract as swamp and overflowed land granted to the State by Acts of Congress of 1849 and 1850, and that the State sold said land to W. W. Smith as swamp and overflowed lands;

That all sales of land in Louisiana claimed as swamp and overflowed lands by the State, whether made by the United States Government or by the State, and whether the land sold was of that character or not, were confirmed by Act of Congress of March 2nd, 1855, entitled "An Act for the relief of purchasers and locators of swamp and overflowed lands";

That said Act was extended to sales made after its passage and continued in force by Act of Congress of March 3rd, 1857, to confirm all selections of swamp and overflowed lands by the several States under the Acts of Congress of 1849 and 1850;

That the said Act of Congress of March 2nd, 1855, for the relief of purchasers and locators of swamp and overflowed lands confirmed the title of the said W. W. Smith to said tract of land known as Silver Lake, whether said land belonged to the State of Louisiana under the swamp land grants of Congress or whether it belonged to the United States;

That W. W. Smith acquired a title to said land, both from the State of Louisiana and the United States, by purchase from the State and by confirmation of Act of Congress, which title is paramount to all subsequent claims from the government and is indefeasible under the Act of confirmation of the 2nd of March, 1855;

That they are the just, true and legal owners of the tract known as Silver Lake, which is illegally withheld from them and a part of which, containing 40 acres or more, is in the possession of George A. Turner, who refuses to deliver the said part of said land to petitioners, and

That the said part of said land is worth $600.

They pray for citation to Turner for judgment for the recovery of said tract of land in his possession, with its revenues, etc.

Turner disclaimed title, averred that he possessed a *portion* of the property described in plaintiff's petition as tenant of the V., S. & P. R. R. Co. Thereupon that company was made defendant in place of Turner and was cited.

The railroad company first excepted to the capacity and the right to sue and stand in judgment of the plaintiffs.

This exception being overruled, the railroad company interposed an exception and plea of *res judicata*, averring:

That in a suit entitled The State of Louisiana vs. W. W. Smith, No. — on the docket of the district court of Caddo Parish, Louisiana, filed ——, 1857, defendant put at issue the validity and legality of his title to the land described in plaintiff's petition, under and by virtue of the certificate and patent described in said petition, and upon a final hearing judgment was rendered in said suit decreeing said certificate and patent null and void, decreeing the cancellation of same, ordering them to be delivered to the State;

That plaintiffs in this suit, the Heirs of W. W. Smith, are bound by the judgment in said suit which is to them *res judicata*. The railroad company then answered denying all the

allegations of plaintiff's petition and averring:

That the sale or entry of said land as set forth in petition was cancelled by the Register of the State Land Office on the 10th day of June, as appears by the record of that office, which cancellation was duly notified to W. W. Smith;

That said sale, entry and patent are null and done without authority of law, in this, to-wit:

1. Because the law under which said entries were made had not been promulgated at the date of the entry.

2. Because said land had not at the time of said entry been legally surveyed nor had any survey thereof been recognized by the State of Louisiana.

3. Because the patent to said land was issued by the Register in error of the fact that said entry had been cancelled before the law authorizing the sale of shallow lakes had been promulgated.

That said land was never selected by the State as swamp and overflowed lands, has never been reported to the Commissioner of the General Land Office and never approved as such by the Surveyor-General or by the Secretary of the Interior or Land Commissioner, was never listed or returned by the Secretary of the Interior to the State of Louisiana as swamp and overflowed lands, has never been acquired by the State as such, does not and never did belong to that class of lands, but to that other class of lands known as shallow lakes, and therefore not embraced in the grant from the United States Government under the Acts of 1849 and 1850 of swamp and overflowed lands.

That the defendant railroad company is owner of said land

by good and sufficient title by grant from the United States Government under Acts of Congress approved June 3, 1856, to the State of Louisiana to aid in the construction of railroads in that State which was accepted by the State for that purpose, all the requirements of said grant having been complied with by the State and by the V., S. & P. R. R. Co. the land described in plaintiff's petition being embraced in said grant was acquired by said railroad company and duly certified or patented as belonging to the said company by the United States and which has been legally sold and transferred by said railroad company to defendant company.

The prayer is that plaintiff's demand be rejected and for judgment decreeing defendant company to be the owner of said land and quieted in possession thereof.

On these issues there was judgment in favor of plaintiffs, R. N. Smith et al., and against the defendant, the V., S. & P. R. R. Co., decreeing plaintiffs to be the owners of the land in controversy, particularly described as shown on map of W. R. DeVoe, surveyor, and overruling the plea of *res adjudicata.*

From this judgment a writ of error was sued out to the Supreme Court of the United States, which was by that Court dismissed for want of jurisdiction, it being held that the amount involved in such judgment was less than $2000. Thereupon the railroad company surrendered to the Heirs of Smith that portion of Silver Lake which had been in possession of their tenant, Turner.

R. N. Smith and the other heirs of W. W. Smith then instituted suit in said Court of the United States against the other tenants of the V., S. & P. R. R. Co., some seventy-five in num-

ber, each holding portions of the tract known as Silver Lake. See record R. N. Smith et al. vs. Jake Foard et al. In this suit there was judgment in favor of the Heirs of Smith decreeing them to be the owners of the Silver Lake tract and entitled to possession of same. On this judgment a writ of possession issued under which the Heirs of W. W. Smith were put in possession, thus acquiring possession of the entire tract, which they ever since held.

RES ADJUDICATA.

The attention of the Court is again directed to the fact that the exact issues raised and decided in the suit of R. N. Smith et al. vs. The V., S. & P. R. R. Co. are again raised in the suit of The V., S. & P. R. R. Co. vs. R. N. Smith et al., the case at bar. This being the fact, it is difficult to see how those issues can be re-examined, considered and determined in the case at bar. The final judgment rendered in suit No. 80 is an effective bar to the present action.

In that suit the Heirs of W. W. Smith, setting up their title fully, aver they own the entire tract known as Silver Lake, a portion of which, about 40 acres, is in possession of Turner. The Vicksburg, Shreveport and Pacific Railroad Company, made defendant, attacked the title so set up, denied the allegation made by the Heirs of Smith, alleged that the company owned and possessed the entire tract under a title derived from the United States Government by Act of Congress of June 3, 1856, granting lands to the State in aid of railroads. The title to the entire tract known as Silver Lake so set up by the Heirs of Smith and the title so set up to the entire tract by the railroad

company was necessarily inquired into and passed on in the suit No. 80. As owners of the entire tract by indivisible title to the whole, each party claimed to own each and every portion of the whole. It was necessary to determine who held title to the whole in order to determine who owned a part of the whole. The judgment in suit No. 80 is for a portion of the Silver Lake tract, but the ownership of that portion could not be determined without passing upon the titles to the entire tract set up respectively by the plaintiffs and by the defendant in that suit. Both titles were considered and determined by that judgment.

The questions raised and determined in the suit No. 80 are identically raised in the suit at bar. Therefore the plea of *res adjudicata* bars the present action.

It would bring the law into contempt, it would be a public scandal if in suits between the same parties, each claiming title to a whole, in one it should be held that the title of plaintiff was good and in another that the title of defendant was good. No such result is legally possible.

Whenever the same question recurs, no matter under what form presented, between the same parties, the plea of *res adjudicata* estops. 35 A. 553; 31 A. 450, 658; 12 A. 197.

If the first judgment settled the question of title against me by deciding that I have neither an undivided co-proprietorship or exclusive ownership whether of whole or part, no question is longer possible, and all pretension to ownership is *res adjudicata*. Marcade p. 170.

To know whether a question presented is or not a thing adjudged, take the proposition established by the first judgment.

Compare it with that which the suitor desires to have established. If the second proposition when compared with the first does not contradict and may co-exist with it, then the question has not been decided. If, on the contrary, the two propositions are contradictory and incompatible, the question presented is a thing adjudged. 5 Marcade p. 159.

The proposition established by the judgment in suit No. 80 was and is that the Heirs of W. W. Smith have a valid title to the entire tract known as Silver Lake, and therefore a valid title to each and every portion of same, including a portion in the possession of the V., S. & P. R. R. Co., through their tenant, Turner, and that the title to the entire tract set up by the railroad company was invalid for the whole and therefore invalid for a part of the whole.

The proposition which the railroad company now desires to have established is that their title to the whole is good, and that they are therefore entitled to a part of the whole, and that the title of the Heirs of W. W. Smith is not good for the whole and therefore invalid for a part of the whole. The second proposition contradicts the first and cannot co-exist with it. Under the same title to the whole, the Heirs of Smith cannot own one portion of Silver Lake and not be owners of all other portions of that tract. Under the same title to the whole held bad for a part, the title to the whole is necessarily held invalid, and it would be a contradiction to say that the title to the whole is bad for one part of the whole and good for another part.

Marcade says further: "If I demand a portion divided or undivided of an immovable, can I, after having been defeated, demand the entire immovable? No, for it has been adjudged

that I have not even a portion and the second judgment would be the negation of the other." Vol. 5, pp. 159-160.

The estoppel extends to every material allegation or statement which having been made on the one side and denied on the other was at issue in the cause and decided therein.

In Herman vs. Louisiana Institute, 34 A. 814, the Supreme Court of Louisiana says: "No principle of the law is more inflexible than that which fixes the absolute conclusiveness of a final judgment upon the parties and their privies. Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection. The estoppel extends to every material allegation or statement which, having been made on the one side and denied on the other, was at issue in the cause and was determined therein."

A judgment has the force and effect of *res adjudicata* as to all matters set up in the pleadings. Erwin vs. Bissell, 17 La. 92. See also 2 A. 462; 14 La. 576; 19 La. 318; 5 N. S. 664; 11 M. 607; 14 La. 233; 5 M. N. S. 170.

In New Orleans vs. Citizens Bank, 167 U. S. 371, 407, the Supreme Court of the United States, Mr. Justice White being their organ, held: The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. This the Court say "Is the elemental rule stated in the text books and enforced by many decisions."

Judgment in action for a part only of an entire indivisible

demand bars action on another part of same demand. 96 U. S. 430; 7 Wall. 619; 142 U. S. 396; 166 U. S. 506.

A fact or controversy once decided by a court of competent jurisdiction cannot be re-examined in suits between same parties or privies. 1 Howard 134; 4 Howard 467; 2 Black 606.

Decree is conclusive whenever the same matter is brougth into controversy. 3 Wheaton 246; 6 W. 109.

Judgment as to issues decided is conclusive upon parties. 9 Peters 8; 106 U. S. 578; 117 U. S. 514; 99 U. S. 261; 139 U. S. 331.

A judgment is conclusive not only as to *res* of case, but to all further litigation between the same parties touching the same subject matter, though the *res* itself may be different. Where parties are identical and title involved is the same, a judgment as to part is conclusive as to title to whole. Beloit vs. Morgan, 7 Wall. 621.

If a judgment be on pleading and proof the estoppel extends not only to what was decided, but to all that was necessarily involved in the issue. 142 U. S. 210; 24 Howard 333; 5 Wall. 580; 91 U. S. 526; 94 U. S. 696.

A decision in respect to any essential fact or question in one action is conclusive between the parties in all subsequent actions. 166 U. S. 517-518; 94 U. S. 351; 101 U. S. 638; 103 U. S. 66; 144 U. S. 610; 152 U. S. 252; 137 U. S. 683. See also a recent case, Lafourche vs. Terrebonne, 49 A. 1331, in which the State court considered and affirmed authorities herein cited.

In the light of these authorities how can anyone fail to see that the plea of *res adjudicata* should be maintained? The

learned counsel of plaintiffs say that the judgment is only for a portion of the Silver Lake tract, viz: 35 18-100 acres, specifically described in judgment, and is therefore conclusive only as to that 35 18-100 acres. They say nothing more and can say nothing more. Counsel forget that when res adjudicata is pleaded the judgment pleaded must be read in connection with the pleadings presenting the issues and questions which that judgment determined. When this is done it becomes clear beyond all doubt that it was determined by the judgment in suit No. 80 that the title therein set up by the Heirs of W. W. Smtih to the entire tract known as Silver Lake was good and perfect, and that the title to the entire tract set up by the railroad company was worthless.

When a suitor alleges that by virtue of a title to a whole thing he is entitled to a part of the whole, the thing demanded is the judicial recognition of his title to the whole. Without such recognition he cannot be entitled to a part of the whole.

But the text writers and the decisions of the courts hereinbefore referred to make all argument on our part unnecessary, and indeed uncalled for.

We submit that the plea of *res adjudicata* should be maintained.

MERITS.

The Railroad Company deduces title to land in controversy from the Act of Congress of June 3, 1856, granting lands to the State of Louisiana in aid of railroads.

From the certificate of the Secretary of the Interior and from a grant made by the State in 1857.

This certificate includes the land in controversy, but it is recited in the certificate that it is given under and subject to all the conditions of Act of June 3, 1856, and subject also "to any valid interfering rights which may exist to any part of the tracts embraced in the list of lands certified."

If the lands in controversy were not included in the grant of June 3rd, 1856, the Department of the Interior could not certify them to the State for the benefit of the railroad so as to give the State title, and if anyone had, prior to June 3rd, 1856, acquired any valid interfering rights in and to said lands, they did not pass under the certificate by its express terms.. The lands in controversy were not granted by Act of June 3rd, 1856. On the contrary, such lands were expressly reserved by the Act itself "from the operation of the Act." It is an uncontested fact that the lands in controversy were in 1849 and 1850 and have ever since remained lands of the character described in the swamp land grants of March 2d, 1849, and September 28th, 1850. It appears from the Act of June 3rd, 1856, that lands previously granted by Congress were reserved from the operation of the Act, and it has been repeatedly held by the Supreme Court of the United States in a line of decisions beginning with Railroad vs. Fremond County, 9 Wall. 89, that the reservations in Act of June 3rd, 1856, clearly embrace the previous grant of the swamp and overflowed lands.

Moreover, prior to June 3rd, 1856, a valid right to the lands in controversy was vested in W. W. Smith. He purchased it from the State in 1853, and a patent therefor was issued to him by the State in 1855.

That the swamp land grants are grants *in praesenti*, vesting

in the State from the date of their passage, title to all lands described in them; and that such lands cannot be acquired under Act of June 3rd, 1856, is settled by repeated and harmonious decisions of the Supreme Court of the United States, the first being that made in Railroad Company vs. Smith, 9 Wallace 95. That case is thus stated by the Court: "The railroad company brought ejectment proceedings against Smith in a State court of Missouri to recover certain lands, deducing title from an Act of Congress approved June 10th, 1852, granting lands to Missouri in aid of railroads (the provisions of which are identical with those of Act of June 3rd, 1856, in favor of Louisiana."

"The Legislature of Missouri in September, 1852, accepted the grant and by statute vested the land granted in the railroad company.

"The title of defendant was deduced from the swamp land grant approved September 28, 1850.

"On trial below defendant introduced evidence tending to prove that the lands in suit were wet and unfit for cultivation at the date of the swamp land grant of 1850. *This was his title.* No evidence was introduced tending to show that the land in suit was ever certified as swamp land by the Secretary of the Interior or that same was ever patented as such to the State. Nor was this pretended."

It will be observed that defendant in case cited was a mere squatter without any title from the State, and that his possession was not shown to have antedated the grant by Congress and the State to the Railroad. His sole contention was that the lands being lands conveyed to the State by the swamp land grant of 1850, could not be disposed of by any subsequent Act of Con-

gress, and that he being in possession could not be dispossessed by anyone claiming under a subsequent Act. This contention was sustained. The Court say: "It is not necessary to defeat the title under the railroad grant to show that all the steps prescribed by Congress to vest a complete title in defendant under the swamp land grant have been taken. *It is sufficient to show that this land now claimed under the railroad grant was reserved out of that grant, and this is done whenever it is proved by appropriate testimony to have been swamp and overflowed land as described in Act of* 1850."

The Court holds that the swamp land grant was a present grant, that all lands desecribed therein were granted to the State and *have remained so granted ever since.* That such grant was protected by positive reservation in the railroad grant. That when a party claiming under the railroad grant sues to recover a particular piece of land which is excepted out of the grant by appropriate language, it is competent to show by parol that it was of the class covered by the first grant and excepted from the second, namely, so swampy, overflowed and wet as that the major part of the tract was unfit for cultivation.

The Court say: "By the second section of the Act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact and furnish the State with evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? *The right of the State did not depend on his action,* but on the Act of Congress, and could not be defeated by his *delay or failure* to ascertain and make out lists, etc. The matter to be shown (i. e. the character of the land) is one of observation and examination, and whether aris-

ing before the Secretary whose duty it was primarily to decide it or before the court whose duty it became because the secretary had failed to do it. This was clearly the best evidence to be had and was sufficient for the purpose.

"Any other rule results in this, that because the Secretary of the Interior has failed in discharging his duty in certifying these lands to the States, they therefore pass under a grant from which they are excepted beyond doubt, and this when it can be proved by testimony capable of producing the fullest conviction that they were of the class excluded from the railroad grant. *The State Court did not err in admitting verbal testimony.* The judgment in favor of defendant Smith is affirmed."

The position of the defendants in the case at bar is much stronger than that of defendant in the case just cited. He held no title from the State. He had acquired no right to the land in his possession prior to the passage of the Act of Congress granting aid to railroads. In the case at bar long prior to that Act the State of Louisiana had accepted the swamp land grants and dedicated the lands granted to the purpose for which they were granted, the construction of levees and drains (Act 258 of 1852) and prior to the said grant to railroads the lands in controversy were sold to W. W. Smith, under whom defendants hold title and possession.

The opinion in case cited has never been overruled, and it has been affirmed in subsequent decisions.

These decisions are referred to in Wright vs. Roseberry, 121 U. S., and are held to establish these propositions:

1—The grant of swamp and overflowed lands to the several

States was in praesenti, passing title to lands of the character therein described from its date, and requiring only identification thereof to render such title perfect.

2—Such identification by the Secretary of the Interior is conclusive against collateral attack as being judgment of the special tribunal on which such duty was imposed.

3—On neglect or failure of that officer to make such designation, it is competent for the grantee of the State to identify the lands in any other appropriate mode to prevent their rights from being defeated.

4—It is error to hold that the certificate of the Commissioner of the Land Office is necessary to pass title to the State. The case must go back for new trial when parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed lands on day swamp land act took effect. If they were such lands, the grantee of the State has title.

In Tibbs vs. Wilhoit, 138 U. S. 134, these propositions are affirmed, and the Court say: "The duty of the Commissioner of the General Land Office to certify over to State swamp and overflowed lands is purely ministerial. He cannot defeat title of State by withholding certificate, nor add to title by giving certificate."

Now apply these decisions to the case at bar.

The land in controversy is of the character described in swamp land grants, title to which was vested in the State at their date. It was sold by the State to W. W. Smith. The failure of the General Land officials to certify the land to the State did not affect the title of the State vested in Smith. Those

officers could not defeat the title of the State by withholding such certificate, nor add to the title by giving certificate; and on the failure of those officers to identify the lands it is competent for the grantees of the State to identify the lands in any other appropriate mode to prevent their rights from being defeated—it is competent for them to prove the character of the lands by parol. Under these decisions it is clear that the V., S. & P. R. R. Co. has no title to these lands, and it is also clear that title to them is vested in the heirs and assignees of W. W. Smith, grantee of the State.

It is contended that these decisions have been overruled by three decisions of the Supreme Court, viz: Chandler vs. Mining Company, 149 U. S. 79; McCormick vs. Hayes, 159 U. S. 332, and Rogers Locomotive Works vs. Emigrant Company, 164 U. S. 559.

Those familiar with the decisions and with the methods of that high tribunal will receive with incredulity the assertion that a line of decisions therein rendered has been overruled by subsequent decisions, *not expressly* but by implication. Such incredulity will increase when it is known that in the opinions by which it is claimed previous decisions are overruled these previous decisions are not only not overruled expressly but are held to have been a correct exposition of the question of law and fact presented in them.

Analysis of the three cases which it is claimed overrule previous decisions will show that they do not overrule previous decisions but are differentiated from them. The judgments rendered in these cases are sound, but the judgments in previous cases are sound also.

In these three cases it appeared that land was granted to a State in aid of railroads, and in one instance in aid of a canal, that under these grants the land in controversy was by the Secretary of the Interior certified to the State; that the State accepted the grants and by patents conveyed the land in controversy to the railroads and canal, who thereupon took possession, and that persons claiming lands in controversy under titles *subsequently* made by the State sought to recover them notwithstanding the prior patent issued by the State on the ground that such lands were overflowed land. It was correctly held that the title resulting from the certificate of the State and from the patent of the State to the railroads could not be annulled or cancelled by any subsequent grantee.

That the State, by accepting the grants in favor of railroads and by conveying same by patents to the railroads, was therefore estopped from claiming lands included in patents as swamp and overflowed lands; that such estoppel extended to any subsequent grantee of the State, and that the State could not take the lands under one grant and thereafter pass to anyone a right to assert an interest in them under another and a different grant.

In Rogers vs. Emigrant Company the case is thus stated:

"The case, then, is this, the State was entitled to the lands under the Act of 1850, swamp land grant, or under Act of 1856, in aid of railroads. It was open to the State before accepting the lands under the railroad Act to insist that they passed under the Act of 1850 as swamp and overflowed lands. No such claim was made. The State primarily interested and with whom the Land Department dealt directly, accepted the lands under the

Act of 1856, and therefore as not inuring to it as swamp and overflowed land, has never repudiated its action, nor sought to have the question reopened.

"The State cannot take them under one Act, and while holding them under that Act pass to anyone the right to assert an interest in them under another Act."

It is held that by accepting the lands in controversy in Rogers vs. Emigrant Company, under the Act of 1856, and issuing patent therefor to the railroad company, the State is *thereafter* estopped and any *subsequent* grantee of the State is estopped from claiming that land under any other grant.

That is undoubtedly sound law. But it does not apply to the case at bar. Prior to the passage of the Act of 1856, under which plaintiff (the V., S. & P. R. R. Co.) claims, the State had claimed the lands in controversy as swamp and overflowed lands and had sold them to W. W. Smith as swamp and overflowed lands, and on April 24th, 1855, issued him a patent therefor. His rights to the land in controversy were on that date vested rights which could not be affected by any subsequent action on the part of the general government or of the State. He and those holding under him are not estopped by the *subsequent* action of the State.

Among the rights so vested in him by that patent is the right to identify the lands bv any sufficient evidence as against anyone seeking to eject him therefrom, if the Secretary of the Interior either neglected or failed to make such identification. That right so vested in him on the 24th day of April, 1855, is vested in those holding under him, and is protected by the Constitution of the United States.

That right so vested and protected cannot be destroyed or affected by any action to which he was not a party.

The rules laid down in Railroad vs. Smith, 9 Wallace, and in Wright vs. Roseberry, 121 U. S. govern this case, and under them there must be in case at bar judgment for defendants.

But it is claimed that the sale to W. W. Smith and the patent issued to him by the State have been cancelled and annulled by effect of a judgment rendered in case of The State of Louisiana vs. W. W. Smith.

That claim cannot be made in the case at bar.

In suit No. 80, Heirs of Smith vs. V., S. & P. R. R. Co., the railroad company pleaded that judgment as *res adjudicata* against the claim of those heirs to the tract known as Silver Lake, and that plea was expressly overruled by the judgment in said suit No. 80. It cannot be renewed in the suit at bar, the parties to both suits being the same. There is no question here whether a whole includes its parts, whether the thing demanded is or not the same. The plea interposed by the railroad company in case No. 80 was that the title to Silver Lake claimed and set up by the Heirs of W. W. Smith was null and void by reason of the judgment rendered in case of State vs. W. W. Smith. That plea was overruled and so far as the parties to the suit No. 80 are concerned, it is a thing adjudged, which as between them cannot be questioned, that the patent issued to Smith by the State and the title to Silver Lake granted him by the State were not annulled or cancelled by the judgment in case of State vs. Smith. It is surely unnecessary to submit

any argument in support of this contention, which is beyond all doubt sanctioned by the authorities hereinbefore cited on *Res Adjudicata.*

Nor is it necessary to show that the judgment rendered in the case of State vs. Smith is not a judgment having the force and effect of *res adjudicata*—but it is easy to do.

While the suit of the State vs. W. W. Smith was pending, Smith died. His death was suggested and leave granted to revive against his heirs and legal representatives. A petition of renewal was filed by the State in which citation was prayed for to John W. Smith, administrator of the succession of W. W. Smith, and to the other legal representatives of W. W. Smith. No one was cited. John W. Smith, administrator, appeared and answered.

The heirs of W. W. Smith were, when the petition of revival was filed, and had been long previously, known and represented in the State and in the parish in which the suit was pending. The action being a *real action,* on the death of W. W. Smith it became necessary to make his heirs parties. Such action could not be maintained against an administrator or against an executor, the succession not being a "vacant" succession. C. p. 122-123; C. C. 1905.

Therefore the proceedings taken in suit of State vs. W. W. Smith were after his death nullities.

But there is no final judgment in that suit which can operate as *res adjudicata.* An appeal was taken from that judgment by John W. Smith in his capacity as administrator of the succession of W. W. Smith, which was pending on the 3rd day of August, 1867. On that date the final account of John W.

Smith, administrator, was homologated. He was discharged from the further administration of the succession and his bond was cancelled by a judgment of the district court of Caddo Parish. As he alone and as administrator represented the defendant in the case of State vs. Smith, when he ceased to be administrator he could no longer represent the defendant, and in the appeal pending at date of his discharge no action could be taken thereafter except to make parties. It appears that some time after such discharge an order was entered in the pending appeal dismissing it, but this order was null and void, there being no party defendant. The appeal is still pending, and the judgment appealed from does not have the effect of *res adjudicata.*

It follows that in the case at bar the sale made to Smith and the patent issued to him must have full effect.

It may be contended that the certificate and the patent issued by the State to Smith are null and void, first, because the law under which the sale was made to Smith on May 14th, 1853, had not been promulgated at that date; and, second, because at that date the Silver Lake tract had not been surveyed, nor had the survey been recognized by the State. The second reason has no foundation in fact. As appears fully in "Statement of Case" hereinbefore made, the Silver Lake tract had been surveyed and its area ascertained. Moreover, the certificate and patent issued to Smith show on their face that the tract had been surveyed and its area ascertained.

The presumption that the land in controversy had been surveyed arising from the entry and patent exists and must

have full effect until it is *conclusively* established that no survey had been made at date of entry and patent. Cole vs. Thompson, 35 A. 1030. Such is also the jurisprudence of the Federal Courts. 7 Wheaton 212; 104 U. S. 636.

The first reason is also invalid. It assumed that the sale to Smith was made under authority of Act No. ...., session 1853.

That sale could have been made under that Act at the date of sale, but whether it could or not the land officers of the State were certainly authorized to sell land in controversy to Smith at date of sale under Act 248 of 1852. The land was swamp and overflowed land, the sale of which was directed by that Act, and Smith purchased with a warrant issued by the State under that Act.

Moreover, if it be for the sake of argument, conceded that the sale to Smith was made under Act of 1853, that such Act had not at date of certificate been promulgated, and that the certificate was null and void, the patent issued in 1855 remains in full force and effect. It is a sale. The State had Smith's money given for the purchase price of the land described in the patent. No one else had applied to purchase the land from the State. There was no reason why the State should not sell to Smith, the only applicant, and the State did sell to him, as shown by the patent long after the Act of 1853 had been promulgated.

RECAPITULATION.

The land in controversy was swamp and overflowed land at the date of the passage of the swamp land grants of 1849 and 1850 vesting from their date in the State title to such land.

The title so vested in the State was vested in W. W. Smith by patent issued February 24th, 1855.

Under such title the heirs and assignees of W. W. Smith are in possession.

The land in question being swamp and overflowed land, was expressly reserved from the grant made to the State in aid of railroads of date ..... 1856, under which the railroad company claims.

Therefore the railroad company has no title under that Act.

Nor can the railroad company claim as against heirs and assignees of W. W. Smith title by estoppel, because while the action of the State in accepting the land under Act of 1856 and conveying it to the railroad company *thereafter* estopped the State and all *subsequent* grantees of the State from claiming said land. W. W. Smith was not a *subsequent* grantee. His title was acquired long before the passage of the Act in aid of railroads and the conveyance by the State to the railroad.

On the merits there should be judgment for plaintiffs in error.

Respectfully submitted,

A. H. LEONARD,

Of Counsel for Plaintiffs in Error.

In United States

Supreme

October Term, 1908

No. 833

A. H. LEONARD, G. E. WILSON, R. N. SMITH, [illegible]

PLAINTIFFS IN ERROR,

vs.

THE VICKSBURG, SHREVEPORT & PACIFIC [illegible]
ROAD COMPANY,

J. H. McCORMICK, Receiver,
and C. C. HARVEY, President,

DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF OF
PLAINTIFFS IN ERROR.

A. H. LEONARD,
E. W. SUTHERLIN,
W. P. HALL,
Of Counsel.

Commercial-Gazette Print, Shreveport, La.

In United States Circuit Court of Appeals

October Term, 1904.

No. 233.

A. H. LEONARD, G. R. WILSON, R. N. SMITH, ET AL.,
PLAINTIFFS IN ERROR,

versus

THE VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY,
J. H. McCORMICK, Receiver,
and C. C. HARVEY, President.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

A. H. LEONARD,
E. W. SUTHERLIN,
W. P. HALL,
Of Counsel.

SYLLABUS.

Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection; the estoppel resulting from a judgment as against parties and privies extends to every material allegation and statement which having been made on the one side and denied on the other was at issue in the case in which said judgment was rendered and was determined

therein, and where parties are identical and the titles and issues are the same as in the former suit, the final judgment in such former suit is conclusive as to the strength of those titles in a second suit where other lands are claimed by both parties under the same titles and the same issues.

168 U. S. 1; 7 Wal. 619;
167 U. S. 371.
157 U. S. 683; 101 U. S. 638.
124 U. S. 225; 24 How. 333.
94 U. S. 351.
Black on Judgments, page 739.

The fact that the judgment of the Feredal Court plead as *res judicata* in the State Court may in the opinion of the State Court have been erroneous, does not render it any the less conclusive of the issues therein decided.

121 U. S. 525;
5 Wall. 580;
101 U. S. 638.
20 Wall. 137;
98 N. Y. 351;
5 Gray 316.

"It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court."

169 U. S. 432; 7 How. 612.

The fact that new evidence may be offered or new arguments suggested does not affect the question.

"Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a re-hearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata.*"

168 U. S. p. 65.

Where in a former suit by these plaintiffs in error against this railroad company for thirty-five acres of the same tract of land, in the United States Circuit Court for the Western District of Louisiana, both parties claimed under the same titles and the same issues under which both parties now claim the remainder of said tract of land in this suit, and there was a final verdict and judgment in favor of these plaintiffs in error in that case upon all of these titles and issues now again presented to the Court, such final verdict and judgment is *res judicata* and conclusive as to all of such titles and issues there decided; and since no new titles or issues are presented in this case, such judgment is conclusive of this case, and the State Court having refused to so hold and give due effect to such judgment, a Federal question of the highest order is presented for the decision of this Court.

120 U. S. 141.
107 U. S. 3.
162 U. S. 329.
169 U. S. 657.
183 U. S. 233.
21 Wal. 130.

STATEMENT OF THE QUESTION.

The question presented for the decision of this Court is one of *res judicata* and estoppel.

The railroad company sues the Smith Heirs and their vendees, Leonard and Wilson, to whom they sold a part interest in the property, for 178.80 acres of land known as Silver Lake, less thirty-five acres recovered by the Smith Heirs in a former suit against the railroad company, being suit No. 80 in the United States Circuit Court for the Fifth Circuit and Western District of Louisiana.

The Smith Heirs, Leonard and Wilson plead the verdict and judgment in that case between the same parties and their privies as *res judicata* and estoppel of all of the issues and questions raised and decided in that case and urged in the case at bar.

The State Court refused to give force and effect to said verdict and judgment of said Federal Court in said suit No. 80 as *res judicata* of the issues and questions therein raised, controverted and decided, and overruled the plea of *res judicata* based on said verdict and rendered judgment for the railroad company on the same titles and issues on which the Federal Court had rendered verdict and judgment against it and in favor of the Smith Heirs for a part of the same tract of land in said suit No. 80.

So that if the judgment of the State Court is allowed to

stand, we will have two final judgments on the same titles and pleadings between the same parties, directly contrary to each other, one court sustaining the title of the one and the other court sustaining the title of the other to parts of the same tract of land.

The plaintiffs in error claim that full faith and credit and proper force and effect were not given by the State Court to the said judgment of the Federal Court in said suit No. 80.

This will appear from the following brief

STATEMENT OF THE CASE.

THE PETITION.

The Vicksburg, Shreveport and Pacific Railroad Company instituted this suit against Albert Tibbs and many others, asserting title to lots 1, 2, 3, 4, 5, 6, 7, 8, 9 of Section 31, Township 18, Range 13, containing 178.80 acres, less a parcel of land recovered by plaintiffs in error in suit of Robert N. Smith, et als. vs. George A. Turner et als., No. 80 in United States Circuit Court, Fifth Circuit and Western District of Louisiana, and more particularly described as follows (then follows a description of the land, 35 acres, recovered in that suit.)

Petitioner further represents that the said company acquired title to said property through the grant of the United

States by Act approved June 3rd, 1856, entitled an Act making a grant to the State of Louisiana to aid in the construction of railroads in said State, duly accepted by the grantee and the trustee, and that the said land was included in the approved selections made under authority of said Act, and that its title was further acquired through divers conveyances, mortgages, decrees and sales, and by the construction of the railroad through the Parish of Caddo from the west bank of Red river to the Texas State line west of Greenwood before the 3rd day of June, 1886. R. 1.

ANSWER AND PLEA OF *RES JUDICATA.*

The defendants, Tibbs et als., disclaimed all title and averred that they are lessees of A. H. Leonard, George R. Wilson and the heirs of W. W. Smith.

Leonard and Wilson and the Heirs of Smith appeared and answered.

They admit that they are in possession of the property claimed by plaintiff, and further admit that they recovered in suit No. 80 in the United States Circuit Court for the Western District of Louisiana, entitled Robert N. Smith et als. vs. George A. Turner et als., the 35 acres excepted from plaintiff's petition. They aver that they are the legal heirs of W. W. Smith except George R. Wilson and A. H. Leonard, who

acquired an interest from the Smith Heirs.

They allege that the State of Louisiana sold to the said W. W. Smith, on the 14th day of May, 1853, the tract of land claimed by plaintiff, at the price of one dollar and twenty-five cents per acre, which was paid to the Treasurer of the State and never returned to him.

That after said sale the State, through the proper authorities, on the 24th day of July, 1855, issued to Smith a patent to said tract of land, as appears by the patent annexed to the answer.

That the State of Louisiana claimed and acquired said tract of land as swamp land and overflowed land granted to the State of Louisiana by Acts of Congress of 1849 and 1850, and that the State sold it to Smith as swamp land.

They further allege that all sales of land in Louisiana made as swamp and overflowed land, whether made by the United States Government or by the State, and whether the land sold was of that character or not, were confirmed by the Acts of Congress approved March 2, 1855, entitled "An Act for the relief of purchasers and locators of swamp and overflowed lands." That said Act of Congress was extenedd so as to protect sales made after its passage by the Act of Congress of March 3, 1857, to confirm all selections of swamp and overflowed lands.

That said Act of March 2, 1855, confirmed said title to

said Smith, whether swamp land or not, and whether it belonged to the State or to the United States.

That said Smith thus acquired a title to said land from both the State and the United States, by purchase from the State and confirmation from Congress, and that said titles are paramount to all subsequent claims from the Government.

PLEA OF *RES JUDICATA* BY DEFENDANTS.

They finally allege that in the case of R. N. Smith et als. vs. George A. Turner, the Vicksburg, Shreveport and Pacific Railroad Company substituted, No. 80 on the docket of the United States Circuit Court for the Western District of Louisiana, sitting at Shreveport, in which these defendants and their authors were plaintiffs, and the present plaintiff, the Vicksburg, Shreveport and Pacific Railroad Comnpay, was defendant, these defendants, then plaintiffs, claimed a part of the same tract of land now in dispute upon the same title upon which they now rely; and the said railroad company, then defendant, now plaintiff herein, also set up title to the same and relied on the same grant and title from the United States that it now sets up and relies upon in this suit.

That in said suit No. 80 a verdict and final judgment were rendered in favor of these defendants and against said railroad company sustaining the titles set up by these defend-

ants as superior to that set up by the said railroad company; and these defendants plead said verdict and judgment as *res judicata* and estoppel of all the questions put at issue and decided in that case, and especially of the right of the said railroad company to claim any other lands under the same title against the same title held by these defendants, the respective strength of which titles was then put at issue and then finally decided.

The record in said suit No. 80 was annexed and made a part of the plea and answer. They prayed that plaintiff's demand be rejected and that the plea of *res judicata* be sustained and plaintiff's demand dismissed. R. 8, 10.

PLEA OF *RES JUDICATA* BY PLAINTIFF.

The plaintiff, the railroad company, filed a plea of *res judicata* to defendant's answer and claim of ownership of said lands.

It alleged that in a suit entitled State of Louisiana vs. W. W. Smith, 5135 on the docket of the District Court of Caddo Parish, filed..... 1857, defendant put at issue the validity and legality of his title to the land described in plaintiff's petition herein, and by virtue of the certificate and patent described in said petition and upon final hearing judgment was rendered in said suit decreeing said certificate and

patent null and void, and decreeing the cancellation of same and ordering same to be delivered to the State of Louisiana, plaintiff therein, "all of which will fully appear by reference to certified copy of pleadings, evidence and judgment in said suit, hereto annexed and made part hereof."

That the defendant obtained an appeal which was dismissed by the Supreme Court in 1869, and that the defendants, claiming to be the heirs and assigns of W. W. Smith, are bound by said judgment in said suit which is as to them *res judicata* and perpetual bar to their rights of action, and therefore plaintiff prays that this exception be sustained and defendant's demand be rejected. R. 14.

This plea of *res judicata* based upon the case of State vs. Smith, No. 5135 in the District Court of Caddo Parish, Louisiana, was presented and urged and relied upon by the railroad company in said suit No. 80 in the Federal Court and was therein overruled and it was one of the issues and muniments of title settled by the verdict and judgment in said suit No. 80, adversely to the railway company; and its want of binding force as *res judicata* against the Smith Heirs was in said suit No. 80 judicially established and became itself the thing adjudged.

This is true likewise of the title set up and urged by the railroad company in the case at bar. It was set up and urged in the case No. 80 and its want of efficacy against the title

of the Smith Heirs was therein judicially established and became the thing adjudged.

The following is a brief statement of the entry by W. W. Smith of this land and of the suit No. 5135 brought to cancel the patent, and of said suit No. 80 in which the judgment in said suit No. 5135 was plead as *res judicata* by the railroad company and overruled by the verdict and judgment in said suit No. 80:

THE LAND ENTRY BY W. W. SMITH.

On April 30, 1853, the Legislature of Louisiana passed an Act authorizing the sale of shallow lakes after they should be surveyed and had become the property of the State. R. 269. It was promulgated June 23, 1853. R. 269. W. W. Smith, the author of defendant's (plaintiffs in error), purchased the land in question known as Silver Lake, from the State, on May 14, 1853. R. 257.

On June 6, 1853, the entry was marked cancelled, because made before the law was promulgated, but his money was not returned or tendered him. R. 275.

On February 24, 1855, nearly two years after the law was promulgated, and his money not having been returned, the State issued a patent to Smith for the land. R. 257.

STATEMENT OF SUIT NO. 5135.

On December 3, 1857, the State brought suit No. 5135 in the State District Court to annul Smith's patent, on the ground that the purchase was made before the law was promulgated, and before the land was surveyed, and that the patent issued in error, and then tendered him the price, the money being furnished to the District Attorney by a private citizen. R. 259, 266.

The suit was dismissed on exception, was appealed to the Supreme Court, reversed and remanded.

W. W. Smith having died, his administration was made defendant on February 14, 1859. R. 264.

On November 12, 1860, the case was tried and there was verdict and judgment in favor of the State annulling said patent. R. 277, 278. From this judgment the defendant appealed to the Supreme Court, where the case remained until 1869, when the minutes show that it was dismissed by consent of counsel after John W. Smith, the administrator of W. W. Smith, had been finally discharged, and there was no one in court representing the succession of Smith or the Smith Heirs. R. 279, 67, 287.

STATEMENT OF SUIT NO. 80.

On November 6, 1885, the heirs of W. W. Smith, the present defendants (plaintiffs in error), instituted suit in the Circuit Court of the United States for the Western District of Louisiana against George A. Turner, who was in possession of about thirty-five acres of the land, the suit being entitled R. N. Smith et als. vs. George A. Turner, No. 80 on the docket of said Court. R. 208.

They alleged that they were the heirs of W. W. Smith and as such succeeded to all of his rights, allege the sale of the land by the State to Smith, the issuance to him of the patent, that it was swamp and overflowed land granted to the State by Acts of Congress of 1849 and 1850, and that it was sold to Smith as such; that all sales of land in Louisiana claimed as swamp and overflowed lands by the State, whether of that character or not, were confirmed by the Acts of Congress, approved March 2, 1855; that said Act was extended to sales made after its passage and continued in force by the Act of Congress of March 3, 1857, to confirm all selections of swamp and overflowed lands by the several States under the Acts of Congress of 1849 and 1850; that said Act of March 2, 1855, confirmed the title of said Smith to the said tract of land, and that he thus got title from both the State and the United States. R. 208.

Turner answered, declaring that he held as tenant of the

Vicksburg, Shreveport and Pacific Railway Company. R. 211.

The railroad company appeared, and, claiming to hold under grant by Act of Congress of June 3, 1856, to the State in aid of railways, and under an Act of the Legislature of 1857 passing said grant to the railroad, filed on July 21, 1886, a plea of *res judicata,* alleging

"That in a suit entitled 'The State of Louisiana vs. W. W. Smith, No..... on the docket of the District Court of Caddo Parish, Louisiana, filed ....., 1857, defendant put at issue the validity and legality of his title to the land described in plaintiff's petition, under and by virtue of the patent described in said petition, and upon a final hearing judgment was rendered in said suit decreeing said certificate and patent null and void, decreeing the cancellation of same and ordering them to be delivered to the State of Louisiana, plaintiff therein; all of which will fully appear by reference to a certified copy of pleadings, evidence and judgment in said suit hereto annexed and made part hereof.

"That plaintiffs in this suit, the Heirs of W. W. Smith, are bound by the judgment in said suit, which is to them *res judicata;* and defendants therefore pray that their suit may be dismissed." R. 218.

On July 29, 1886, the railroad company filed its answer.

It "alleges that the sale or entry of said land, as set forth in petition, was cancelled by the Register of the State Land

Office on the 10th (6) day of June, 1853, as appears by the records of that office, and which cancellation was duly notified to said Smith, and that said sale, entry and patent are null, and were done without authority of law, in this, to-wit:

"First—Because the law under which said entries were made had not been promulgated at the date of the entry.

"Second—Because said land had not at the time of said entry been legally surveyed, nor had any survey thereof been recognized by the State of Louisiana.

"Third—Because the patent to said land was issued by the register in error of the fact that said entry had been cancelled before the law authorizing the sale of shallow lakes had been promulgated.

"Further answering, defendant alleges that said land was never selected by the State of Louisiana as swamp and overflowed land, and has never been reported to the Commissioner of the General Land Office and never approved as such by the Secretary of the Interior or Land Commissioner; and further alleges that said land was never listed or returned by the Secretary of the Interior to the State of Louisiana as swamp and overflowed lands, and that the State of Louisiana has never claimed or acquired said land as such; and furthermore, that said land had not and never did belong to that class of lands, but to that other class of lands known or designated as shallow lakes, and therefore not embraced in the grant from the

United States Government under the Acts of Congress of 1849 and 1850, of swamp and overflowed lands.

"Defendant further answering alleges that said defendant company is the owner of said land by good and sufficient title, by grant from the United States Government under Act of Congress approved June 3, 1856, to the State of Louisiana, to aid in the construction of railroads in said State of Louisiana, and which was accepted by said State of Louisiana for such purpose, and all of the requirements of said grant having been complied with by said State and by the Vicksburg, Shreveport and Pacific Railroad, the land described in plaintiff's petition being embraced in the said gran was acquired by the said railroad company and duly certified or patented as belonging to the said company by the United States Government, and which has been legally sold and transferred by said railroad company to defendant company and deed duly recorded." R. 291.

Upon these pleadings and issues the case No. 80 went to trial, and there was a verdict for the plaintiffs, the Smith Heirs, for the land sued for, being about thirty-five acres of the Silver Lake tract. R. 293.

There was judgment for plaintiffs in accordance with the verdict as follows:

"U. S. Circuit Court, Fifth Circuit, Western District of Louisiana. Robert N. Smith et al. vs. George A.

Turner and the Vicksburg, Shreveport and Pacific Railroad Company. No. 80.

"In this case, by reason of the law and the evidence and the verdict of the jury being in favor of the plaintiffs and against the defendants, it is ordered, adjudged and decreed that the plaintiffs, Robert N. Smith, Elizabeth A. Smith, wife of Marvin Duval; Elizabeth W. Smith, William L. Smith and John S. Smith, be and they are hereby declared to be the owners of the land in controversy and entitled to possession of same, said land being known and designated as follows (then follows description) containing thirty-five and 18-100 acres, situated in the Parish of Caddo, Louisiana," etc.

"It is further ordered and decreed that plea of *res judicata* be overruled." R. 294.

A writ of error was taken to the Supreme Court of the United States but was dismissed for want of jurisdiction, the thirty-five acres involved in that suit being worth less than two thousand dollars. See the case reported in 135 U. S. 195, with a remarkably clear statement of the issues involved.

We have thus quoted the pleadings in that case No. 80 at great length, for the reason that it is the verdict and judgment in that case that we urge and plead in the case at bar as *res judicata* and estoppel of every issue of law and fact herein involved; every question of law and fact here in contest having

been there litigated and decided, the only difference between the two cases being that this suit is for a different piece of the same tract of land claimed by both sides under the same titles. The railroad company relied upon the same title in that case as in this and urged the same plea of *res judicata* based upon the judgment of the State Court in the case of the State of Louisiana vs. W. W. Smith, No. 5135, that it urges in this case; and the Smith heirs urge precisely the same titles urged in that case.

Compare the railroad company's answer in the suit No. 80 (R. 291) with its petition in this case (R. 1) and compare its plea of *res judicata* based on the case of State vs. Smith (R. 218) with its plea of *res judicata* in the case at bar (R. 14); and compare the petition of the Smith Heirs in that case (R. 208) with their answer in the case at bar (R. 8, 10). Indeed, it is not denied that the titles and issues are the same between the same parties.

The case was tried and from an adverse judgment the defendants appealed to the Supreme Court of the State, where the judgment of the lower court was affirmed.

From the judgment of the State Supreme Court they took this writ of error to this Court, after an unavailing application for a re-hearing, and make the following

ASSIGNMENT IF ERRORS.

"First—The Court erred, as they believe, in overruling the pleas of *res judicata* and estoppel interposed by plaintiffs in error as defendants in this case, based upon the judgment of the Circuit Court of the United States for the Fifth Circuit, Western District of Louisiana, in the case of R. N. Smith et als. vs. George A. Turner and the Vicksburg, Shreveport and Pacific Railroad Company, No. 80 on the docket of said Court.

"Second—The Court erred in refusing to hold that issues set up and decided in said suit in said Federal Court were *res judicata* of the same issues when set up in this suit between the same parties, and in holding that where the same parties had in a former suit set up the same titles set up by each in this suit, and there was final judgment upon the same, that these issues and these titles could be again set up and litigated between the same parties, when other lands acquired under the same titles are in controversy.

"Third—The Court erred in holding that where a part of a tract of land was in a former suit claimed by one party under a title, and the defendant in that suit claimed the land under another title, and there was final verdict and judgment between the parties as to which had the

better title, and in a subsequent suit involving another piece of land, a part of the same tract, between the same parties, each set up a claim of ownership by the same title under which he haid claimed the former piece of land, that in such case the judgment so rendered passing on the strength of the two titles in the former suit is not *res judicata* as to their strength in the subsequent suit.

"Fourth—The Court erred in refusing to hold that the matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, and in refusing to hold that the estoppel resulting from a judgment as against parties and privies extends to every material allegation and statement which having been made on the one side and denied on the other, was at issue in the case in which said judgment was rendered and was determined therein, and in refusing to hold that where parties are identical and the titles involved are the same, a judgment in the one case is conclusive as to the strength of those titles in another case, where other lands are claimed by both parties under the same titles and the same issues.

"Fifth—The Court erred in refusing to give effect to the reservation made in the Act of Congress of June 3, 1856, granting land to the State of Louisiana in aid

of railroads, of all lands previously granted or as to which interposing rights existed.

"Sixth—The Court erred in refusing to hold lands granted to (in) the swamp land grants and in which third parties had acquired rights could not be granted by any subsequent Act of Congress.

"Seventh—The Court erred in holding that the Act of Congress of June 3, 1856, granting land in aid of railroads vested title to the land in controversy in the Vicksburg, Shreveport and Pacific Railroad Company, and that despite the reservation in said Act these lands passed under it although they had been previously granted to the State by the swamp land grants.

"Eighth—The Court erred in holding that the Vicksburg, Shreveport and Pacific Railroad Company has a legal right to the land in controversy good against the world enabling it to recover in a petitory action.

"Ninth—The Court erred in holding that an action to annul a title to the land being a real action, may after the death of the defendant be revived and prosecuted by citation only to the administrator of the deceased defendant, even though the heirs of said defendant are known and present or represented by agents, tutors or guardians.

"Tenth—The Court erred in holding that the judgment in the said suit of the State of Louisiana vs. W. W. Smith in the District Court of Caddo Parish, Louisiana, had and has the force of the thing adjudged.

"Eleventh—The Court in rendering a decree and in entering a judgment herein in favor of plaintiff and against the defendants, your petitioners, such judgment and decree being contrary to the law and the evidence. R. 320.

ARGUMENT.

The first four assignments of error relate to the overruling of the plea of *res judicata* based upon the verdict and judgment in the suit No. 80.

The judgment plead as *res judicata* and estoppel was rendered in the United States Circuit Court for the Western District of Louisiana in suit No. 80 on the docket of that Court.

It was a suit between the same parties, the Smith Heirs being plaintiffs in that suit and defendants in this; while the Vicksburg, Shreveport and Pacific Railroad Company was defendant in that suit and plaintiff in this.

That suit was for the recovery of thirty-five and 18-100 acres of a larger tract known as Silver Lake, containing 178.57 acres. This suit is for the recovery of the remainder of said tract.

In the former suit the Smith Heirs as plaintiffs claimed under the same title that they set up now as defendants in this suit, and the railroad company set up the same title in that case as defendants that it relies upon as plaintiff in this suit, and made the same charge of nullity against the title of the Smith Heirs that it makes as plaintiff in this suit.

In other words, the two titles that were pitted against each other in that suit and the assaults made upon them were precisely the same as in the present suit.

In that suit there was a final judgment in favor of the Smith Heirs sustaining their title and rejecting that of the railroad company, and rejecting the charges of nullity urged then and now against the title of the Smith Heirs.

The railroad company plead the judgment in State vs. Smith as *res judicata* against our title in that case as in this. There was final judgment in that case in our favor and we plead it as *res judicata* of the issues here presented.

The only difference between the two suits is that this suit is for the remainder of the same tract of land and does not embrace the 35.18 acres, though all depend upon the same issues and same titles decided in that suit between the same parties.

Are these issues settled as between the same parties by that judgment, or are they open to be revamped anew?

Are these titles, after being weighed against each other

and their weight finally determined, to be weighed against each othr again, to find if, perchance, this time the greater weight be given to the other?

The titles and issues now presented are the same "matters in issue or points controverted upon the determination of which the finding or verdict was rendered" in said suit No. 80.

In a recent case of importance the Supreme Court of the United States applied these principles to a suit involving title to a large quantity of land. It was the case of the Southern Pacific Railway Company vs. United States, 168 U. S. 1.

In that case the United States sued to recover certain lands which had been granted to the Atlantic and Pacific Railroad Company and afterwards forfeited by Act of Congress.

In the meantime a grant had been made to the Southern Pacific Railroad Company and it claimed that when the former grant was forfeited the land reverted to it under its grant. The United States claimed that the Atlantic and Pacific Railroad having filed its maps of definite location, the land was withdrawn from the public domain and was unaffected by the grant to the Southern Pacific.

In some former suits where the United States claimed other lands on the same grounds, the same defenses were urged and there was final judgment in favor of the United States, and the latter plead the former judgments as *res judicata*, and the plea was sustained, the Court holding that al-

though the case involved different lands from those involved in the former suits, yet the titles and issues were the same and that the final judgment rendered in the former suits upon those issues and titles was *res judicata* between the same parties as to all other lands claimed upon the same grounds. It was suggested in argument that certain points and arguments arising on these titles were not made or passed upon in the former suit and should now be considered, but the Court refused to entertain this view, remarking that "Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a re-hearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata.*" Ibid, p. 65.

That case seems to be on "all fours" with the case at bar. In both cases the titles and issues were the same, but the land was a different tract in each case.

The State District Judge overruled the plea for two reasons, First, because the suit No. 80 involved a tract of thirty-five acres, while the present suit involves the remainder of the tract, about 142 acres; and, Second, because the judgment in suit No. 80 overruling the plea of *res judicata* presented in that case and again in this, based upon the judgment of the

State Court in State vs. Smith, was, in his opinion, rendered upon a false or mistaken certificate of the clerk of the Supreme Court of the State, that the appeal in State vs. Smith had not been filed in the Supreme Court, causing the record to show that the case of State vs. Smith had not been disposed of. R. 15.

We do not understand that this Court is concerned with the reasons assigned by the inferior court, but only with those assigned by the Supreme Court; but as counsel have seen proper to quote at length from the opinion of the district judge, we will examine it.

The judge says:

> "Through an error on the part of the clerk of the Supreme Court, he signed a certificate, on July 26, 1886, stating that the case of the State vs. W. W. Smith had not been filed in the Supreme Court. This certificate was filed in the case of Robert N. Smith vs. George A. Turner, causing the record in that case not only to show that the administrator of the succession of W. W. Smith had filed his final account, and had been ordered discharged, but that the case of the State vs. W. W. Smith had not been finally disposed of.
>
> "It is the opinion of the court that it is owing to the fact that the certificate above referred to indicated that no final decision had been rendered in the case of the

State vs. Smith that caused the judge to hold in the case of Smith vs. Turner that the entry of W. W. Smith had not been cancelled." R. 15.

This certificate (R. 288) would show just the reverse. If the transcript of appeal from the judgment rendered in 1860 had not been filed in the Supreme Court by July, 1886, the appeal would be abandoned in law. Indeed, if an appeal is not filed in three days after the return day fixed in the order of appeal, it is lost unless an extension of time is granted.

But it is probable that the judge intended to refer to the extract from the minutes of the Supreme Court signed by Dupree, clerk Supreme Court, (R. 287) which shows that the case was on the Supreme Court docket at Natchitoches and was continued on August 14, 1866. R. 287.

There is no error in this. He does not certify that this was all the orders that had been rendered in the case; indeed, it is not certified at all, but is a mere extract from the minutes of the Supreme Court signed by the clerk.

There was no error in Clerk Wilson's certificate that the appeal had not been filed at Monroe, for it appears to have been filed at Natchitoches.

If there was error at all, it was in the railroad company's failing to examine the minutes of the Supreme Court after August 14, 1866, and find out and show what had been done with the case on August 11, 1869. Surely this was no fault of

the Smith Heirs or of the clerk of the Supreme Court.

But even if the judgment in suit No. 80 had been erroneous, or had been rendered on a false certificate, or on false testimony (not procured by the adverse party), these things would not make it any the less *res judicata*. The State Court had enough to do to decide the case before it without inquiring as to the correctness of the judgment of the Federal Court plead as *res judicata*.

In the very next sentence of the opinion, after making this collateral attack upon the final judgment in suit No. 80, the court recognizes that a final judgment is not subject to collateral attack by saying of the judgment in State vs. Smith, that

> "In the case of the State of Louisiana vs. W. W. Smith, the judgment annulling the title to W. W. Smith to 'Silver Lake' and 'Cross Lake' having become final, it was not subject to be collaterally attacked."

It did not treat the final judgment of the Federal Court with the same consideration.

In Central National Bank vs. Stevens, 169 U. S. 432, at page 459, the Court quotes with approval from Peck vs. Jenness, 7 How. 612, as follows:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which

occurs in the cause, and whether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every other court; and that where the jurisdiction of a court an dthe right of a plaintiff to prosecute his suit in it have once attached, that right can not be arrested or taken away by proceedings in another court."

In almost every case the parties could prove other facts if not prevented by *res judicata,* and if that would justify a court in rejecting the plea, it would be of little value.

The rule is just the reverse. He has his day in court in which he must produce all of his testimony. Subsequently discovered testimony cumulative in support of the titles urged in the former suit will not re-open the question. This alleged dismissal was in August, 1869, nearly twenty years prior to the trial of suit No. 80, and the lower court was clearly in error in holding that subsequently discovered testimony avoided the effect given to the solemn and final judgment of the Court. 168 U. S. 1.

The question is not whether the judgment in suit No. 80 was correct on the evidence produced or on such as might have been produced, but the question is: Was it a final judgment?

After hearing on the same issues between the same parties, *res judicata* makes white black and black white.

Once established, it is like any other title which it is the

duty of the Court to respect and enforce.

As already stated, the district judge and also the State Supreme Court assigned as another reason why they would not give due effect to the judgment of the Federal Court in said suit No. 80—that said suit involved only the thirty-five acres claimed in that suit and that in determining the question of jurisdiction on appeal the Supreme Court of the United States held that the thing of value before it, the *res*, was only the thirty-five acres claimed, and dismissed the appeal.

135 U. S. 195.

This ruling of the Supreme Court of the United States was a correct conclusion as to what was before it. Only thirty-five acres were claimed in that suit and that judgment finally decided the title to only the thirty-five acres and the judgment could have been executed upon only the thirty-five acres.

But it is *res judicata* as to all of the *issues, titles and grounds of recovery and defense* set up and litigated and decided between these parties in that suit, whenever the same may arise in other suits about other property between the same parties or their privies.

What we contend for is that the status and strength of the same titles now relied upon by both parties in this case were tested and settled in that suit and that that judgment is conclusive as to the strengh of these titles when set up against

each other in any other case between the same parties in the same capacity.

Had either party raised other issues than those raised in the former suit, as, for instance, title by prescription or by tax sale, or by purchase from a stranger, or from his antagonist's author, the former judgment would not be *res judicata* as to any of such issues, because they were not raised or decided in such former judgment.

But it so happens in this case that no issues are in fact raised that were not raised and decided in the former case. The judgment, therefore, in that case being *res judicata* of all these issues, they are not open to controversy in this case.

The same thing happened in the case of the Southern Pacific Railroad Company vs. United States, 168 U. S. 1 (already cited). In that case both claimed certain lands. In a former suit or suits, the same parties had claimed other lands under the same respective titles. No issues were raised that were not raised and decided in the former suits. The judgments in the former suits were plead as *res judicata* as to these issues and the plea was sustained.

So in the case at bar; the titles and issues are precisely the same as in the former case.

The railroad company sets up the same title; the Smith Heirs set up the same. The railroad company sets up the same plea of *res judicata*, based upon the same judgment of the

State Court in the case of State vs. Smith, that it set up in the former case.

Upon all these issues there was verdict and judgment for the Smith Heirs in said suit No. 80, and we submit that such verdict and judgment are *res judicata* of these issues in this suit; and there being no other issues in this suit said judgment is *res judicata* of this case, and if due effect had been given to the judgment of the Federal Court in said suit, No. 80, by the State Court it would have so held.

Some effort has been made to construe the judgment of the Supreme Court of the United States in dismissing said suit, No. 80, for want of jurisdiction as in some way limiting the effect of the judgment in that case. If we were claiming that that judgment finally awarded the whole of Silver Lake to us, there would be something in the contention, but we are not claiming that; but claiming simply that the questions, titles and issues raised, litigated and decided in that case by these parties can not be again litigated between them, and there is not one word or hint in the opinion of this Court that militates against the finality of that judgment as to the issues therein determined. See the opinion in 135 U. S. 195.

Res judicata is not confined to the thing, the property, in dispute, but extends to every material allegation and statement which having been made on the one side and denied on the other was at issue in the case in which such judgment was

rendered and was determined therein, and where parties are identical and titles and issues are the same as in the former suit, it is conclusive as to the strength of those titles and of those issues, and especially so where other lands, part of the same tract, are claimed by both parties under the same titles and issues.

In City of Aurora vs. West, 7 Wall. 82, plaintiff sued on coupons of fifty bonds for three years' interest. Two former judgments for other coupons of the same bonds were successfully urged as *res judicata* of the validity of the bonds.

Held: "Where the parties are the same, the legal effect of a former judgment as a bar is not impaired because the subject matter of the second suit is different, provided the second suit involves the same title and depends upon the same question."

In Morgan vs. Beloit, 7 Wall. 619, the plaintiff sued on certain bonds issued under a statute of Wisconsin. In a former suit he had recovered judgment on other bonds of the kind against the same defendant.

This Court said: "Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject matter, though the *res* itself may be different."

In Cromwell vs. County of Sac., 94 U. S. 351, this Court re-affirmed this doctrine and drew the distinction between cases where the same *res* and those where a different *res* was in-

volved; and declared the law to be that where the *res* is the same the bar of *res judicata* is absolute and cuts off every issue that was made or could have been made; while in cases where the *res* is different it bars only such issues and titles as were in fact urged and decided in the former case, a distinction which in no manner affects our contention in the case at bar, for here the issues and titles are identical with those litigated and decided in the former case.

In Lumber Co. vs. Buchtel, 101 U. S. 638, where the same defense was urged against the suit on the note for the second installment of the price of some timber that had been urged in a suit between the same parties on the first note, the Court applied the rule and held the finding in the first suit conclusive of the second.

In Bissell vs. Spring Valley Township, 124 U. S. 225, which was a suit on coupons of bonds which had been found illegal in a suit on prior coupons of the same bonds, this Court applied the rule saying in concluding the opinion: "The facts and the law are adjudged matters between the parties, and not open, therefore, to any further contest."

In Milne vs. Deen, 121 U. S. 525, a judgment against plaintiff in a suit for one month's rent was sustained as *res judicata* of a subsequent suit for $12,026.89 for two years' rent under the same lease, the lessee having abandoned the premises, and it appearing that the first suit was defended on

the ground of fraud and the second on the same ground.

In that case this Court also said: "The effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered. It not being set aside by subsequent proceedings, by appeal or otherwise, it was equally effective as an estoppel upon the point decided, whether the decision was right or wrong. Packet Co. vs. Sickles, 72 U. S., 5 Wal. 580; Lumber Co. vs. Buchtel, 101 U. S. 638; Tioga R. R. Co. vs. Blossburg & C. R. R., 87 U. S., 20 Wal. 137; Pray vs. Hegeman, 98 N. Y. 351; Merriam vs. Whittemore, 5 Gray 316."

In the Johnson Co. vs. Wharton, 152 U. S. 252, it was urged against a former judgment between the same parties on the same question when plead as *res judicata* of a second suit for a large amount, that the former judgment was for so small an amount that it could not be brought before this Court on appeal, and that this Court should not, therefore, respect its findings.

But the contention was rejected by this Court both on principle and authority, saying:

"The existence or non-existence of a right, in either party, to have the judgment in the prior suit re-examined, upon appeal or writ of error, can not, in case, control this inquiry."

In New Orleans vs. Citizens Bank, 167 U. S. 371, a Louisiana case, this Court again held that:

"The estoppel of a judgment does not depend upon the question whether or not there is the same demand in both cases, but it exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

In that case this Court said at page 398: "And the law of Louisiana is exactly in accord with the rulings of this Court," citing numerous cases; and the Supreme Court of Louisiana in the case at bar makes no claim that there is any difference.

In the case of Harvin vs. Blackman, 112 La. 24 (1904) the Supreme Court of Louisiana recognized and enforced the rule here invoked that *res judicata* applies where the *res* is different if the titles and issues are the same.

In that case the suit before the Court was for the ownership of a plantation; the judgment invoked was for the rent of one year under a lease. The Court held it to be conclusive of the validity of the lease when assailed in the suit for the plantation.

These authorities, with the case of Southern Pacific Railway Company vs. United States, 168 U. S. 1, already cited, would seem to settle the law of the case, and there being no dispute that the titles and issues in this suit are the same litigated and settled between the same parties and their privies in

the suit plead as *res judicata*, they seem to be conclusive of the case without discussing the merits.

These principles the State Court does not deny, but simply ignores them, though they seem to be sound on principle and authority.

We submit the judgment should be reversed.

A. H. LEONARD,
E. W. SUTHERLIN,
W. P. HALL,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 233.

A. H. LEONARD, GEORGE R. WILSON, R. W. SMITH *ET AL.*

PLAINTIFFS IN ERROR.

versus

THE VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY,

J. H. MCCORMICK, RECEIVER,

AND

C. C. HARVEY.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

MOTION TO DISMISS OR AFFIRM.

Come now the defendants in error, the Vicksburg, Shreveport & Pacific Railroad, J. H. McCormick, receiver, and C. C. Harvey, by their counsel of record, Harry H. Hall, Frank P. Stubbs and W. H. Wise and move the

Court to dismiss the above entitled cause for want of jurisdiction in the Supreme Court of the United States to review the same in that:

No Federal question sufficient to give jurisdiction to this Court to review the decision of the State Court is involved in the cause or was decided by the Supreme Court of Louisiana.

The Supreme Court of Louisiana based its decision upon sufficient grounds which did not involve and are not claimed to involve a Federal question;

Or, if the writ of error shall not be dismissed, that the judgment of the said Supreme Court of Louisiana be affirmed, on the ground that although in the opinion of this Court, the record may show that this Court has jurisdiction, it is manifest that said writ of error was taken for delay only, and that the question upon which jurisdiction depends, is so frivolous as not to need further argument.

HARRY H. HALL,
W. H. WISE,
FRANK P. STUBBS,
Counsel for the Above Named Appellees.

To Messrs. W. P. Hall, E. W. Sutherland, Albert H. Leonard.
Counsel representing the claimants herein:

Please take notice that on the 18th day of January 1904, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of our brief or argument in support of this motion.

HARRY H. HALL,
FRANK P. STUBBS,
W. H. WISE,
Counsel for above named Appellants.

BRIEF.

STATEMENT OF FACTS AND PLEADINGS.

The Petition.

The Vicksburg, Shreveport & Pacific Railroad Company, a corporation organized under the laws of the State of Louisiana, brought this suit in the First District Court of Louisiana, Parish of Caddo, No. 5231, against sundry possessors, asking that it be decreed to be the owner of and, as such, put in possession of the following tract of land situated in Caddo Parish, Louisiana, to-wit:

Lots 1, 2, 3, 4, 5, 6, 7, 8 and 9 of Section 31, Township 18, Range 13 west, containing 178 80-100 acres, less a certain parcel of land recovered by Robert N. Smith and others in the suit of Geo. A. Turner et al., and which parcel of land originally formed a part of the said nine lots and is fully described by metes and bounds, in the petition, and consists of 35 18-100 acres. Plaintiff, therefore, sues herein for 143 22-100 acres. T. p. 1.

The Answer.

The possessors, made defendants, disclaim all interest in the property, averring that they are lessees and tenants of A. H. Leonard, Geo. R. Wilson and the heirs of W. W. Smith, all of whom, for plea and answer to the plaintiff's suit, set up that they, being either the heirs of W. W. Smith or parties privy, instituted a suit, No. 80 on the docket of the Circuit Court of the United States for the Western District of Louisiana, against Geo. A. Turner, alleging and claiming ownership of the entire tract above described, which was known as Silver Lake, and praying to be restored to possession of about forty acres of said tract illegally held by the said Turner.

That, in said suit, Turner appeared, disclaiming title and averring that he was a tenant of the Vicksburg, Shreveport & Pacific Railroad Company, plaintiff in this suit, and that, thereupon the said railroad company answered, claiming possession and ownership of the entire tract known as Silver Lake.

That, on final hearing, a judgment was rendered in said suit No. 80, in favor of the plaintiffs therein, said heirs of W. W. Smith, decreeing them to be the owners of the land in controversy in said suit, and they were put in possession of the same.

That the said judgment is effective and final and has the force and effect of *res adjudicata*, as against all parties to said suit and as against the claims of the plaintiffs herein, and estops it from asserting the said claim. T. p. 6.

Further, the said defendants answer that the State of Louisiana sold to W. W. Smith, on the 14th of May, 1853, the said tract of land claimed by plaintiff, for the price of $1.25 per acre which was paid into the Treasury of the State by the said Smith and was never returned to him; that, on the 24th of February, 1855, the State of Louisiana through its constituted authorities issued a patent to said tract of land to the said Smith;

That the State of Louisiana claimed and acquired the said tract of land as swamp and overflow land, granted to the State of Louisiana by Acts of Congress of 1849 and 1850—as the Swamp Land Grants, and that the State sold the said lands to the said Smith as swamp and overflowed lands;

That all sales of land in Louisiana made as swamp and overflowed land, whether made by the United States or by the State of Louisiana, and whether the land sold was of that character or not, were confirmed by the Acts of Congress approved March 2nd, 1855, entitled "An act for the

relief of purchasers and locators of swamp and overflowed lands;"

That the said Act of Congress of March 2nd, 1855, was extended so as to protect sales after its passage, by the Act of Congress of March 2nd, 1857, to confirm all selections of swamp and overflowed lands by the several States under the Acts of Congress of 1849 and 1850;

That the said Act of Congress of March 2nd, 1855, confirmed the title of the said W. W. Smith to the said tract of land, whether said land belonged to the State of Louisiana, under the Swamp Land Grant of Congress, or whether it belonged to the United States and that the said Smith thus acquired a title to the said land, both by purchase from the State of Louisiana and by confirmation by Congress;

That in the case of **R. V. Smith et al. vs. Geo. A. Turner,** the Vicksburg, Shreveport & Pacific Railroad Company substituted, No. 80 on the docket of the United States Circuit Court for the Western District of Louisiana, said railroad company *"claimed a part of the same tract of land now in dispute,"* upon the same title upon which they now rely and which is set forth above;

That judgment was rendered against the said railroad company in said suit No. 80, sustaining the title set up by these defendants who plead said judgment as *res adjudicata* and estoppel. T., pages 8, 9 and 10.

One of the said defendants, Albert H. Leonard, further answering, sets up in addition to the defense, just recited, of his co-defendants, that the said railroad company sued out a writ of error to the Supreme Court of the United States from said judgment, in said suit No. 80, and that the said Supreme Court dismissed the said writ and affirmed the said judgment, which, thereupon, became final and conclusive. P 10.

Plea of Railroad Company.

Thereupon J. H. McCormick, receiver for the Vicksburg, Shreveport & Pacific Railroad Company, filed his plea and exception of *res adjudicata* to defendant's answer and plea therein of ownership of the said lands, averring that, in a suit entitled **State of Louisiana vs. W. W. Smith et al.**, No. 5135 of the docket of the District Court of Caddo Parish, Louisiana, filed in 1857, said defendant put at issue the validity and legality of his title to the land described in plaintiff's petition herein and claimed, by virtue of the certificate and patent described in said petition, and, upon final hearing, a judgment was rendered in said suit decreeing said certificate and patent null and void, and decreeing the cancellation of the same and ordering same to be delivered to the State of Louisiana, plaintiff therein;

That in the said suit, No. 5135, defendant obtained an order of appeal from the judgment of Court rendered therein to the Supreme Court, which said appeal was dismissed, and that said judgment is *res adjudicata*, and a perpetual bar to defendant's rights of action. T. P. 14.

Opinion and Judgment.

The opinion and judgment of the Judge of the First Judicial District Court of Caddo Parish in this suit, No. 5231, is substantially as follows:

Defendant's plea of *res adjudicata* is based upon the fact that in suit No. 80, United States Circuit Court, **Smith et al.** sued **Turner** for 35.18 acres in the tract of 178.80 acres, known as *Silver Lake*, and recovered a judgment against the Vicksburg, Shreveport & Pacific Railroad Company therefor, as Turner's lessor.

That, on the trial of that cause, counsel for the Vicksburg, Shreveport & Pacific Railroad Company offered to prove that the entire tract of 178.80 acres was worth $10,000.00, whereupon counsel for **Smith et al.** objected upon the ground that the title to the 178.80 acres was not in controversy, but only the title to the 35.18 acres, being the tract sued for. That the question was thus directly put at issue whether the suit involved the title to the entire tract or merely to those particular 35.18 acres for which Turner was sued. The Court says:

> "The same parties who now contend that the decision in that case constitutes the thing adjudged as "to the entire tract of 178.80 acres, at that time successfully contended that nothing was at issue except "the question of right of ownership to 35.18 acres. In "his decision on that point, the presiding Judge "said:
>
> "'The testimony of the above named witnesses was "'not heard because the petition claimed only the "'number of acres of land held by or in the possession of Geo. A. Turner, the defendant; that the "'judgment in this case, if for the plaintiff, could "'affect only the land held by Turner.'" P. 15.

The Court says that when the suit was carried to the Supreme Court of the United States on a writ of error, the attorneys for the **Smith heirs** moved to dismiss the writ of error, contending that there was no appellate jurisdiction of the Supreme Court, as the only question at issue was the possession of 35.18 acres of land worth not over $2,000.00 and there was no controversy relating to the entire tract of 178.80 acres, worth $10,000.00, and that, in the motion to dismiss the writ of error, they say:

> "It is therefore submitted that no competent question is raised upon the record except as to property worth about $2,000.00 and, therefore, the writ of error should be dismissed."

He adds that the Supreme Court of the United States concurred in this view of counsel and dismissed the writ of error, holding that no property was at issue or could be affected by the judgment in the case, except that particular tract of 35.18 acres;

> That "it is now asked of this Court, in this case, "that the said judgment in suit No. 80 awarding to the "Smith heirs 35.18 acres of land, be so extended as to "cover the entire tract of 178.80 acres, and to ignore "that part of the same case in which it is decided, "both by the Circuit Court and the United States "Supreme Court, that the decision in that case in no "manner involves the entire tract."
>
> "And thereupon the plea of *res adjudicata* field by defendant herein is overruled." T. p. 16.

As to the plea of *res adjudicata* set up by the railroad company against the Smith heirs, the Court finds that, upon the 30th of April, 1853, *an act* was passed by the *Legislature of Louisiana* authorizing the Register of the State Land Office to sell the *shallow lakes* in this State, *provided that such sales should not be made until the lands had become the property of the State and had been legally surveyed and the property recognized;*

That said Act was not promulgated until June 23rd, 1853;

That, on May 14th, 1853, *Crenshaw*, Register, certified that *W. W. Smith* had purchased from the State and had paid $1.25 per acre for the shallow lake known as Silver Lake in the Parish of Caddo, containing 186.57 acres; That the evidence showed that this area had not been surveyed and listed, at that time, as required.

That a patent issued, on the 24th of February, 1855, as "shallow lake land" pursuant to the said Act of the Legislature *which lake was not claimed to be swamp and overflowed lands.*

That *Crenshaw*, Register, of the State Land Office testified in the case of the **State vs. Smith** that the land sold to Smith was never claimed as swamp land nor sold as such;

That *Harleson*, who was register at the time, testified in that case on the 19th of December, 1857, as follows:

> "In the warrant book there is opposite Smith's "entry of Silver Lake, the following words in the "handwriting of W. H. Crenshaw, Register, to-wit: "'This sale is cancelled, because sold in error, the "law not having been promulgated. June 6th, 1853.' "(Signed) Wm. H. Crenshaw, Register."

That the evidence of Crenshaw shows that the notice of cancellation was served on Smith;

That the evidence further shows that a legal tender of the money paid was made December 3rd, 1857;

That the petition in the suit of the **State of Louisiana vs. W. W. Smith**, sets forth that the Register issued the patent to W. W. Smith to Silver Lake in error. *First*, because the law had not been promulgated; *secondly*, because the lake had not been surveyed, nor had the surveys ever been recognized by the State; and, *thirdly*, because the patent was issued by L. J. Sigur, Register, in error of the fact that the law had not been promulgated at the time of the entry, and of the other fact that the entry had been cancelled before the law had been promulgated. P. 17.

That judgment was rendered, on the 24th of November, 1860, in favor of the State cancelling the Smith entry;

That an appeal was taken by Smith, administrator, returnable to the Supreme Court of Louisiana, on the second Monday of July, 1861, which appeal was not heard by reason of the civil war, and was not determined until August 11th, 1869, when the said appeal was dismissed, leaving the judgment of the District Court cancelling the Smith entry in full force;

That an erroneous certificate of the Clerk of the Supreme Court filed in the case of **Robert N. Smith vs. Geo. A. Turner, No. 80,** as above, caused that record to show that the case of the **State vs. W. H. Smith** had not been finally disposed of;

That, in the opinion of the Court, it was this certificate which caused the Judge, in the suit No. 80, to hold that the entry of W. W. Smith had not been cancelled;

That in the case of the **Texas & Pacific Railway Company vs. Robert N. Smith et al.,** the United States Circuit Court of Appeals said, in speaking of the title of W. W. Smith:

> "We find that entry to have been cancelled and annulled, the suit of the State and adjudication therein having become final by the action of the highest Court of the State." P. 18;

And the Court further finds that the title of the Vicksburg, Shreveport & Pacific Railroad Company in and to the lands in question is perfect;

That, the said railroad company was chartered by Act No. 228 of the Acts of the Legislature of Louisiana of 1853;

That, on the 3rd of June, 1856, Congress donated to Louisiana for the express purpose of aiding in the construction of a railroad on the Texas Line to Greenwood, Shreveport and Monroe to a point on the Mississippi river opposite Vicksburg, every alternate section addition of land for six sections in width on each side of the road;

That in 1857 the State accepted the donation, and granted the lands to the railroad company, the Legislature, at the same session, authorizing the said company to mortgage the said lands; that the said lands were duly selected and listed as required; that the identical numbers involved in this suit were certified to the railroad company

by the United States Government Land Office Department, on October 3rd, 1859, and approved by the Secretary on the same day; that the road was built and the grant earned;

That in 1858 the United States Land Office Department, passing upon the identical tract of land involved in this suit, decided that it belonged to the railroad company; that the Commissioner of the Land Office held, in March, 1872, that these lands fell within the railroad grant, and the same decision was rendered in March, 1881;

That the title in said railroad company having been repeatedly adjudicated by the Supreme Court of Louisiana and by the Land Office at Washington, its title is considered to be perfect; and the Court, thereupon, rendered judgment in favor of said railroad company for the 178.80 acres of land less the 35.18 acres aforesaid.

This judgment was rendered and signed, on the 14th of April, 1903.

An appeal was, thereupon, taken from the said judgment in this suit No. 5231 returnable to the Supreme Court of Louisiana on the second Monday of May, 1903. P. 21.

It further appears from the transcript that in the suit of the **Vicksburg, Shreveport & Pacific Railway Company, vs. Smith et al.** October term of 1889, Supreme Court of the United States, No. 276, the defendants in error moved to dismiss the writ of error for the reason that the money therein in dispute did not exceed the sum of $5,000.00, exclusive of interest, and in support of the said motion to dismiss they averred that they were, as the heirs of W. W. Smith, the owners of the 186 acres known as the Silver Lake, which is illegally withheld from them, "*and a part of which, containing forty acres, more or less, is in the unlawful possession of Geo. H. Turner, of the said Parish of Caddo and State of Louisiana, and a citizen of the said*

State, who refuses to deliver the said part of the said land to your petitioners, after amicable demand; such part is stated to be worth, at least, six hundred dollars." T. p. 23.

By the judgment in said suit said plaintiffs are declared to be the owners of the land in controversy and entitled to the possession of the same. Said lands being known and described as follows:

> "'Commencing at a rock, etc., containing 35.18 "acres situated in the Parish of Caddo,'" etc., etc. P. 23.

That, as shown by a bill of exceptions, the railroad company offered to show that the land claimed by plaintiffs under the grant from the United States Government was worth $10,000.00, whereupon "*plaintiff's counsel objected, upon the ground that the only part of the Silver Lake tract of 186 acres that was in controversy in this suit was the part alleged to be in the possession of the defendant, Turner, and it was admitted by the counsel for the defendant that said part or parcel of land was not worth exceeding two thousand dollars.* P. 24.

A certificate of the Commissioner of General Land Office of December 13th, 1887, shows that the nine lots in question were embodied in the grant to the railroad company and have been duly approved by the Honorable the Secretary of the Interior, on the 7th of October, 1859. P. 32.

Mortgage by the railroad company of this property in 1857. P. 34.

Decree of foreclosure upon said mortgage, July 3rd, 1879. P. 38.

May 31, 1856, telegram, Commissioner General Land Office to Register and Recorder, Monroe and New Orleans, Louisiana, ordering suspension of sale or location until further orders, of the lands in question. T., pages 42-43.

Letters containing the same instructions, June 16th, 1856. Pages 43-44.

Letter from the Commissioner General of the Land Office, Washington, June 16th, 1856, to the Governor of Louisiana, enclosing a printed copy of Public Act No. 25, making a grant of land to the State of Louisiana for the construction of certain railroads, approved June 3rd, 1856, said grant being made directly to the State. T. p. 44

Letter from the Commissioner General Land Office to Registers and Recorders in Louisiana, Oct. 22nd, 1856, directing that office to cease to permit location to entries by pre-emption for any purpose whatever of the land within fifteen miles of the route as definitely fixed by the said railroad

Certificate of the Governor of Louisiana, dated July 18th, 1884, showing the construction, completion and equipment of the railroad in question. P. 49.

Like certificates of the Governor of Louisiana, of Sept. 20th, 1872; 6th of November, 1883; 15th of January, 1884; 14th of March, 1884; 18th of July, 1884. T., pages, 49 *et seq.*

Sale of railroad, under decree of foreclosure. T., page 53.

Certificate to the Honorable the Secretary of the Interior, March 20th, 1872, that the Silver Lake lands were withdrawn from the market on the 31st day of May, 1856, for the benefit of the Vicksburg, Shreveport & Pacific Railroad, and on the 7th of October, 1859, it was approved to the State for the benefit of said road. P. 63.

Certificate of the Honorable the Secretary of the Interior, of March 18th, 1881, showing that the land in question lies within the grant to the said Railroad Company. P. 65.

Copy of petition filed Nov. 6th, 1885, of the **Heirs of W. W. Smith vs. Geo. A. Turner, U. S. Circuit Court,**

Western District of Louisiana, No. 80, setting up the acquisition by the said Smith of the land in question, to-wit: 186.57 acres, and averring the ownership of the petitioners in the same, and containing the following averment:

> *"A part of which, containing forty acres or more, is in the unlawful and wrongful possession of one Geo. A. Turner, of the said Parish of Caddo and State of Louisiana, and a citizen of the said State, who refuses to deliver the said part of said land to your petitioner, after amicable demand, as will be fully shown on the trial of this suit.*
>
> *"And they pray for citation of said Turner and for the recovery from him of said tract of forty acres."* T. p. 68

Judgment, in the said suit, was rendered, on the 4th of August, 1886, in favor of the said Heirs of Smith and against the said Railroad Company, for the tract of land in question, minutely described by metes, bounds and lines run, and containing 35.18 acres. P. 71.

By a bill of exceptions, filed in the said suit No. 80, it would appear that, on the trial of the said cause, counsel for the Railroad Company offered witnesses to prove that the value of the land in controversy was worth $10,000.00, *"whereupon plaintiff's counsel objected on the ground that the only part of said Silver Lake tract of 186 acres, that was in controversy in this suit, was the part alleged to be in the possession of the defendant, Turner, and it was admitted by the counsel for the defendant that the said part or parcel of land was not worth exceeding Two Thousand Dollars."*

And, thereupon, the plaintiff's objection to the said evidence was sustained, because the petition claimed only the number of acres of land held by her in the possession of Geo. A. Turner, the defendant, *"and that the judgment*

in the case, if for plaintiff, could affect only the lands held by Turner, etc." P. 72.

Copy of petition, **State of Louisiana vs. W. W. Smith, No. 5135, Eighteenth Judicial District Court for the Parish of Caddo, filed Dec. 3rd, 1857,** avers that the Legislature of the State of Louisiana passed an act, on the 30th of April, 1853, "authorizing the Register of the Land Office to sell certain *shallow lakes* in that State; which act was promulgated on the 23rd of June 1853, and provided that the Register of the Land Office at Baton Rouge be authorized *to sell shallow lakes in the said State, the area of which had been ascertained by surveys, and which are susceptible of being reclaimed, wholly or in part, by draining or leveeing; provided, that this act shall not apply to any swamp lands in this State; and provided that the said sale shall not be made until the lands have become the property of the State and been legally surveyed and the surveys recognized by the State.*" P. 259.

Petitioner avers that, on the 14th of May, 1853, Crenshaw, Register of the Land Office at Baton Rouge, pretending to act under the said law, sold to W. W. Smith, who pretended to purchase under said law, certain lands known as Silver Lake, containing 186.57 acres, at $1.25 per acre, for which a certificate of entry was issued by the Register.

Petitioner avers that the certificate of entry of Silver Lake was issued by Sigur, Register; but your petitioner avers that the sale of this Silver Lake land had been cancelled by Crenshaw, Register, on the 10th of June, 1853.

Petitioner avers that the sale, entry and patent were null, because the law had not been promulgated, at the date of the entries, and because this lake had not been surveyed, nor the survey recognized by the State, and because the patent to Silver Lake was issued by Sigur, Register, in error of the fact that the law had not been

promulgated, at the time of the entry, and also in error of the other fact that the said entry had been cancelled before the law had been promulgated.

Petitioner avers that a legal tender had been made to Smith of the money paid by him; and the petition prayed for the surrender of the patent and certificate of the entry and the cancellation of the same. P. 259.

Defendant, after the filing and dismissal of an exception, put in an answer, denying the allegations of the said petition, and claiming ownership of the land in question. P. 264.

Evidence of the tender to Smith, in gold, of the purchase price made by him, is shown at p. 266.

Act of the Legislature of Louisiana, of April 30th, 1853, authorizing the Register of the Land Office to sell the shallow lakes of the State, the area of *which had been ascertained by survey, and providing that such sale should not be made until the lands had become the property of the State, been legally surveyed and the surveys recognized by the State,* is found in transcript, p. 269.

Crenshaw, Register, testified that the entry to Smith was made on the 14th of May, 1853; that the same was made by him in error, the law not having been promulgated; that he made an entry to cancel, and, immediately, gave notice of the same.

The lands, in question, were never claimed as swamp lands, nor surveyed as such. P. 274.

Haralson, acting Register, testified that he had frequently been applied to by persons to enter lakes, but had refused to sell the same, they not having been selected as swamp, and, therefore, not the property of the State. P. 275.

Patent issued to W. W. Smith, on the 24th of February, 1855, showing "that said W. W. Smith had purchased,

with warrant No. 1, a certain shallow lake, known as 'Silver Lake,' situated," etc. P. 277.

The verdict of the jury, in suit No. 5135, was in favor of the plaintiff, ordering that the certificate and patent to W. W. Smith be annulled and delivered up. T. p. 277.

Judgment was rendered, upon said verdict, ordering that the certificate of entry in favor of W. W. Smith "*be annulled, avoided and delivered up; and it is further ordered, adjudged and decreed that the patent issued on the 24th day of February, 1855, in favor of W. W. Smith, the defendant, for Silver Lake, in the Parish of Caddo, township 18, ranges 13 and 14, containing 186.57 acres, and issued by L. J. Sigur, Register of the Land Office, be annulled and avoided and delivered up, and that the defendant pay the costs*"

Judgment, Nov. 24th, 1860. T. p. 278.

Motion for an appeal. T. p. 279.

The certificate of the Clerk of the Supreme Court of the State of Louisiana, showing that the case of the **State of Louisiana, Appellee, vs. W. W. Smith, Appellant,** was, on the 11th of August, 1869, *dismissed by consent of counsel.* T. p. 67.

Petition and writ of error to the United States Supreme Court, in the case of **Smith vs. Turner, No. 80,** P. 295.

The United States Supreme Court dismissed this writ of error, stating:

> "The judgment is limited to a piece of land, described by metes and bounds, and containing 35 18-100 acres, as shown by a map and survey of the same on file and of record in the cause. The value of that parcel of land is shown clearly to be not over $2,000, and this is conclusive as to our jurisdiction."
>
> **Vicksburg, etc., Railroad Co. vs. Smith,** 135 U. S., pp. 195-200.

The opinion and decree of the Supreme Court of Louisiana, in the instant case of the **V. S. & P. R. R. Co. vs. Tibbs et al., Heirs of W. W. Smith et al., substituted,** find that there was a judgment in favor of the State decreeing the annulment and cancellation of the patent issued to W. W. Smith and the granting of the land in question to the railroad;

That the Secretary of the Interior had made numerous decisions touching the land in question, which had obtained the force and effect of *stare decisis,* to the effect that the said lands had been earned by the Railroad Company as part of the judgment to it;

That, in the suit of **R. W. Smith et al.,** brought in 1885 in the Circuit Court, for forty acres of land, there was judgment for plaintiff for 35.18 acres, which judgment was taken by writ of error to the United States Supreme Court, where plaintiffs moved to dismiss, on the ground that the Court was without jurisdiction, for the reason that the value in dispute was that of the particular parcel of land occupied by Turner, and not that of the entire Silver Lake tract, and the Court, adopting that view, dismissed the writ.

Referring to the **V., S. & P. R. R. Co. vs. Smith,** 135 U. S. 195, the Louisiana Supreme Court, upon these facts, stated that they were unable to follow the reasoning by which the defendants endeavored to show that the judgment in the *Turner* case constituted *res adjudicata* with respect to that title, since, whatever force there may be in the general proposition that a judgment as to the ownership of a portion of a tract of land is conclusive between the same parties, claiming under the same titles, as to the ownership of the whole tract, the fact remains that the final judgment, in any particular case, is the law in that case, and that the thing adjudged in, and hence, the law of the

Turner case is precisely the reverse of that for which the defendants contend. P. 311.

> "And so, with regard to the question of estoppel. The proposition advanced in the **Turner** case, that the title to the whole Silver Lake tract was then at stake—not having been decided adversely to its contention—the present plaintiff is entitled to whatever advantage is to be derived from that ruling, whilst the present defendants, whose position was there sustained, must now take the consequences, and cannot be heard, here, to assert what they, there, denied." P. 311.

And the Louisiana Supreme Court, thereupon, considering the plea of *res adjudicata* and estoppel predicated by the Railroad Company on the judgment in the case of **Smith vs. Smith**, found that the State alleged that the Register of the State Land Office had assumed to sell the Silver Lake tract, under the authority of the Louisiana Act, No. 284 of 1853, which made special provision for the sale of "shallow lakes," as counter-distinguished from swamp and overflowed lands; and further alleged that the sale was made before the act was promulgated, and in disregard of its provisions;

And the Supreme Court finds that there was judgment for the State in the District Court, annulling the title set up by Smith, "being the identical title here set up by his heirs and their transferees." The Court said:

> "From the judgment so rendered, the administrator appealed to this Court, and in 1869, the appeal was dismissed by consent of counsel." T. p. 312.

The Court then meets the contention of counsel for the defendants, that a judgment so rendered does not constitute *res adjudicata*, determining the points raised, citing

authorities and deciding them adversely to defendant's contention, and saying:

"We, therefore, conclude that the plea of *res adjudi-*
"*cata,* as set up by the plaintiffs, is good.

"This conclusion disposes of the contention that "W. W. Smith bought the lands in question as swamp, "or overflowed lands, since the State, in a suit just "referred to, distinctly alleges that it was not so sold, "and its position was sustained by the judgment there-"in rendered. But if it had been sold as lands ac-"quired under the Acts of Congress of 1849 and 1850, "the result would be the same, since it belonged to "that class of land which, under the Act (of Lou-"isiana) No. 247 of 1855, could only have been sold "after having been surveyed, and one of the causes "of action set up by the State, in its suit against "Smith, and maintained by the judgment therein "rendered, was, that it had not been surveyed.

"Finally, it is argued that, under the Acts of Con-"gress of 1849 and 1850, title *in praesenti* to all "swamp and overflowed lands within its limits vested "in the State of Louisiana, without regard to selec-"tion or approval; that the land in question was of "that character, and that the State acquired it under "those acts, and, hence, that the United States could "not have granted, and the State (or the Railroad "Company) could not have acquired it under the Act "of June 3rd, 1856.

"The Acts of 1849 and 1850, were, clearly, not in-"tended to operate against the will of the State. On "the contrary, they distinctly left it to the State to "select, subject to the approval of the Secretary of "the Interior, the lands which it might consider with-"in the terms of the grant.

"Whether the State might have selected the tract "in question, and whether said selection might or "would have been approved, need not be here con-"sidered. In point of fact, not only was the selection "not made, and the approval not given, but the

"grantor and the grantee concurred in the view that "the tract fell within the terms of the Act of 1856, and "was granted to and acquired by the State of Lou- "isiana, as the Trustee of the V., S. & P. R. R. Co. "for the purpose of aiding in the construction of the "railroad which that company was to build." T., page 313.

And the Louisiana Supreme Court thereupon referred to the interpretation placed by this Court upon the Swamp Land Act of 1850, as given in the case of **Rogers Locomotive Machine Works vs. The American Emigrant Co.**, 164 U. S. 359, a summary of that decision being that the Swamp Land Act of 1850 gave an inchoate title to the State; that the identification of the lands by the Secretary of the Interior was necessary before the title became perfect; that the certificate of the Secretary, in 1858, that certain lands enured to the State, under the Railroad Act of 1856, was a decision that they were not embraced by the Swamp Land Act of 1850; that the acceptance by the State of lands certified to it by the Secretary is conclusive upon the State, and that a contract with a county for swamp and overflowed lands gives no better right than the county had to the lands which had been previously certified to the State. T. p. 313.

Further, the Louisiana Supreme Court states that, apart from the defenses which have been thus considered, there apppears to be no objection to plaintiff's title, which has more than once been affirmed by that Court. They refer to **Railroad vs. Sledge**, 41 La. An. 896; **Moore vs. Kemp**, 42 La. An. 1007; **State vs. Railroad**, 44 La. An. 981; **Railroad vs. Elmore**, 46 La. An. 1237.

And, thereupon, the judgment of the lower court was affirmed. T. p. 313.

THE PETITION FOR A REHEARING

Avers that the Court erred, First, in maintaining that the case of **Smith Heirs vs. Turner, No. 80,** was *res judicata* and, Second, in overruling the plea of *res adjudicata,* based upon the judgment in this suit No. 80. T. p. 314 *et seq.*

The rehearing was refused. Thereupon, defendants filed a petition and obtained an order for a writ of error to this Court. T. p. 318.

Attached to this petition is an assignment of errors, the defendants averring that the Court erred:

First. In overruling the pleas of *res adjudicata* and estoppel based upon the judgment in the case of **Smith vs. Turner, No. 80.**

Second. In refusing to hold that the issues set up in that case were *res adjudicata.*

Third. In holding that a verdict as to the ownership of part of a tract of land was not *res adjudicata* as to the remainder of the land.

Fourth. In refusing to hold that estoppel resulting from a judgment as against parties and privies extended to every material allegation made on the one side and denied on the other.

Fifth. **In refusing to hold that the Acts of Congress usually known as the Swamp Land Grants, were and are grants in praesenti, vesting at their date in the State and its assigns title to the land in controversy herein.**

Sixth. **In refusing to give effect to the reservation made in the Act of Congress of June 3rd, 1856, granting lands to the State of Louisiana in aid of railroads of all lands previously granted to the State by the Swamp Land Grants.**

Seventh. **In refusing to hold lands granted to the Swamp Land Grants, and in which third parties had acquired rights, could not be granted by any subsequent Act of Congress.**

Eighth. **In holding that the Act of Congress of June 3rd, 1856, granting land in aid of railroad, vested title to the land in controversy in the V., S. & P. Railroad, and that, despite the reservation in said Act, the said lands passed under it, although they had been previously granted to the State as Swamp Land Grants.**

Ninth. In holding that the V., S. & P. R. R. Co. has a right to the land in controversy.

Tenth. In holding that an action to annul a title to the land, being the real action, may, after the death of the defendant, be revived and prosecuted by citation only to the administrator of the deceased defendant, even though the heirs of said defendant are known and present or represented by agents, tutors or guardians.

Eleventh. In holding that action may be taken, proceedings had and orders made in a cause pending on appeal, in the absence of any party defendant.

Twelfth. In holding that the judgment in the suit of **State vs. Smith Heirs** had, and has, the force of the thing adjudged.

Thirteenth. In rendering a decree and in entering a judgment in favor of plaintiff against defendants, such judgment and decree being contrary to the law and the evidence. T., page 320.

May It Please the Court:

From the foregoing abstract of questions involved, and the manner in which they are raised, the following facts apppear:

In 1849 and 1850 the Federal Government granted to Louisiana, to aid in reclaiming the same, all swamp and overflowed lands in that State belonging to the public domain, and which lands, upon survey, selection and approval, were to vest in fee simple in the State, subject to disposal of the Legislature thereof.

April 30, 1853, the Louisiana Legislature authorized the Register of the State Land Office to sell the *shallow lakes* in that State, "provided the sale should not be made until the lands had become the property of the State and had been legally surveyed and the survey recognized."

This law was not promulgated until June 23, 1853.

May 14, 1853, *Crenshaw,* Register, certified that, under this inchoate act, W. W. Smith had purchased from the State 186.57 acres, known as Silver Lake.

This had not been surveyed and listed at the time.

June 6 1853, *Crenshaw,* Register, cancelled the sale to Smith, because made in error under a law which had not been promulgated, and served on Smith notice of this cancellation and making to him formal tender of the price paid.

Feb. 24, 1855, *Sigur,* Register, in ignorance of these facts, issued to said Smith a patent for said Silver Lake.

Dec. 3, 1857, the State of Louisiana brought suit against W. W. Smith to have cancelled the entry, entry certificate, and patent aforesaid, upon the grounds above stated. Answer was filed and a judgment duly rendered in favor of the State by the District Court, annulling the entry certificate and patent as prayed.

On Nov. 24, 1860, an appeal was taken to the Supreme Court of the State, where, Aug. 11, 1861, after some delay due to the pending of the Civil War, the appeal was dismissed and the judgment of the lower court became, and to this day has remained, final.

Meanwhile, the Silver Lake tract, under exact surveys, selection and approval, found to contain 178.80 acres, was, on June 3, 1856, donated to Louisiana to aid in the construction of the railroad in question, the State accepting said donation in 1857 and granting the same to the Railroad Company, the United States certifying to that company, by the identical numbers, the Silver Lake Lands involved in this suit.

Notwithstanding the judgment annulling Smith's patent, and the repeated confirmation of the Railroad Company's title, the Heirs of Smith, on the 6th of November, 1885, brought suit in the United States Circuit Court for the Western District of Louisiana, No. 80, of its docket, against Geo. A. Turner, who, they alleged, was in possession of 40 acres of said Silver Lake, and asking for recovery of said 40 acres. The Railroad Company, whose tenant Turner was, defended the suit. There was judgment against the company, presumably due to an erroneous certificate of the Clerk of the Louisiana Supreme Court, showing falsely that the case of **State vs. Smith** had not been disposed of, and thus causing the Judge to hold that Smith's entry had not been cancelled.

The writ of error taken to the United States Supreme Court from this judgment was dismissed upon the application of the Heirs of Smith, who averred that the only issue involved in the suit of **Smith vs. Turner** was the 35.18 acres in Turner's possession. 135 U. S. 200.

May 5, 1896, *this* suit was brought by the Railroad Company against the heirs, assigns and possessors of W. W.

Smith, in the District Court of Caddo Parish, claiming title to and possession of the Silver Lake property, to-wit: 178 80/100 acres, less the 35 18/100 acres recovered in the suit against Turner.

Defendants set up the **Turner** case as *res judicata*, and further alleged that Congress granted the lands in question to the State of Louisiana in 1849-1850; that the State sold them to W. W. Smith, as above set out; that the Act of Congress of March 2, 1855, confirmed all selections of swamp lands made by the State, and confirmed the title to Smith.

The Judge of the District Court rendered judgment in favor of the Railroad Company, as herein before set forth; and, on appeal, the Supreme Court of Louisiana, in a lengthy opinion, affirmed that judgment. The opinion of the Supreme Court of Louisiana is to be found at pp. 311 *et seq.* of the transcript.

The Court found no merit in defendant's contention that this title to the 178.80 acres had been maintained in the *Turner* case, because this Court had dismissed defendants' writ of error upon their representation that title to only 35.18 acres was involved, thereby depriving them of the judgment of this Court on the question of title. And the Supreme Court of Louisiana, upon the authority of its decisions, found that the judgment rendered in the case of **Smith vs. Smith**, annulling Smith's title, was final, and his heirs and assigns were estopped to again set up that title. The Court held that the land was not bought by Smith as swamp or overflowed land, but if it had been so purchased as lands acquired under the Acts of Congress of 1849-1850, "the result would have been the same, since it belonged to that class of land which, *under the Act of the General Assembly (of Louisiana)* No. 247 of 1855, could only have been sold after having been surveyed," etc. T. p. 312.

The Court disposes of the contention that title *in praesenti* to all the swamp land vested in the State, without approval or selection, in direct opposition to the very terms of those acts, by finding, *as a matter of fact,* that the "grantor and the grantee concurrred in the view that "that act fell within the term of the Act of 1856, and was "granted to and acquired by the State of Louisiana as the "trustee for the V., S. & T. R. R." T. p. 315.

And the Court, in support of its conclusions, cites 164 U. S. 559, **Rogers vs. American Emigrant Co.**

From this examination of the opinion of the Louisiana Court, it is evident that no Federal question is involved in the case.

The only assignments that can be considered are those referring to the erroneous construction of the Acts of Congress of 1849-1850 and 1856, but the decisions of the State Courts herein against the Smith title rest upon the decreed illegality of that title for violation, *not* of the Federal statutes, but of the Act of April 30, 1853 *of the Louisiana Legislature,* it having been decreed that Smith had purchased, in violation of the provisions of that act and prior to its promulgation. Hence, had title *in praesenti* vested in the State, the Louisiana Land Register could not sell to Smith under a State enactment not promulgated nor in violation of *its* express provisions.

It has been repeatedly held that the construction of a State statute belongs to the State courts, and is not a Federal question that can be reviewed by the Supreme Court, by writ of error, unless the State court gives such a construction to the State statute as to make it conflict with the Constitution or laws of the United States, and sustains its validity after giving it such construction, and therefore deprives a party of his rights under said Constitution and laws.

Ins. Co. vs. Treasurer, 11 Wall. 204.
Conn. vs. Woodruff, 153 U. S. 689.

Again, it has been stated, as a general rule, that, in order to give the Supreme Court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that the decision of the Federal question was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

Johnson vs. Risk, 137 U. S. 300, 307.
Desausure vs. Gaillard, 127 U. S. 216.
N. O. vs. N. O. Waterworks Co., 142 U. S. 79.
O'Neil vs. Vermont, 144 U. S. 323, 336.
Northern Pacific R. R. Co. vs. Ellis, 144 U. S. 458.

And this rule has been followed to the point that,

"Even if a Federal question was raised in a State court, yet, if the case was decided on grounds broad enough in themselves to sustain the judgment without reference to the Federal question, the Supreme Court will not entertain jurisdiction."

Conn. vs. Woodruff, 153 U. S. 689.
Sherman vs. Grinnell, 144 U. S. 198.

"Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved, so that the State court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision (**Hayward vs. Denny**, 158 U. S. 180, 183 and 184). Where no Federal question is dealt with, in the opinion of the appellate court of the State, no Federal question is presented by the record, then the writ of error will be dismissed."

Miller vs. Texas, 153 U. S. 535, 538.

But were this not the law, and had the Louisiana Supreme Court been compelled to rest its own decision upon an interpretation of the Acts of Congress, and had held that they were not grants *in praesenti*, vesting fee immediately in the State, but that such title only vested after survey and acceptance by the State and approval by the Secretary, although a Federal question would be thus raised, it would be so obviously correct, under the adjudications of this Court, that the cause would not be returned.

Rogers Locomotive Works vs. American Emigrant Co., 164 U. S. 559.

Michigan Land, etc., Co. vs. Rusk, 168 U. S. 592.

Brown vs. Hitchcock, 173 U. S. 476.

In **Equitable Life Assurance Society vs. Brown**, 187 U. S., p. 308, this Court said:

> "From the foregoing, it results that a claim under the Constitution and laws of the United States was made and decided in the court below, and if the fact that such a claim was formally made and disposed of below without reference to its substantial foundation, determined the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real substantive question upon which the case may be made to turn; that is, a real, and not merely a formal, Federal question is essential to the jurisdiction of this Court. Stated in another form, the doctrine thus declared is, that, although in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction, was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a de-

cision or decisions of this Court as to leave no room for real controversy, the motion to dismiss will prevail.

N. O. Waterworks Co. vs. Louisiana, 185 U. S. 336, 345, and authorities there cited." P. 311.

In the case of **Richardson vs. The L. & N. R. R. Co.,** 169 U. S., p. 128, this Court said:

"But in sustaining the ruling of the trial court and excluding the alleged grant, the Supreme Court (of Florida) rested its decision on the want of authority to make such a grant as it held this to be. Therefore, the contention on behalf of the plaintiff in error is that this Court necessarily has jurisdiction.

"As, however, we entirely concur with the State Court in the view that the grant was not a grant of title, but of a mere license, easement or right of use, and no evidence of prior possession was offered, we need not consider whether the grant, as thus correctly construed, was valid or not, for, even if valid, the ruling on this record could not have been other than it was. That ruling was so obviously correct that we do not feel constrained to retain the case for further argument." P. 132.

We submit that the motion should prevail.

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